REPORTS

OF

IMPORTANT CASES

Heard and Determined

BY THE

SUPREME COURT OF CEYLON,

DURING THE YEARS

1860, 1861 AND 1862.

With an Appendix containing cases decided during that period by the Judicial Committee of the Privy Council on appeal from the Supreme Court of Ceylon.

BY

P. RÂMA-NÂTHAN,

ADVOCATE.

COLOMBO:

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1880.

NOTE,

In my preface to the reports for 1820—33, I stated that if the judgments of the Supreme Court for the thirty years comprised in the following periods, viz,—

1820—1833
1847—1855
1860—1868,

could be published, the profession would have a complete series of reports from 1820—1874.

In 1877, I published the reports for 1820—33.

Since then I have not been able to work with effect on the scheme I had set before myself, as I had to give my prior attention to the publication of the reports for 1877, and of the *Supreme Court Circular* for 1878 and part of that *Circular* for 1879.

The volume I now issue comprises the reports for the three years ending 1862. The reports for 1861 and 1862 have never been printed, though the reports for 1860 were partially, in the pages of the *Legal Miscellany*. I need not say that the *Legal Miscellany* went out of print many years ago.

P. RÂMA-NÂTHAN.

Colombo,
May, 1880.

JUDGES DURING THE PERIOD EMBRACED IN THIS VOLUME.

Chief Justices.

The Honorable Paul Ivy Sterling (*acting.*)
The Honorable Sir Edward S. Creasy.

Puisne Justices.

The Honorable Richard F. Morgan (*acting.*)
The Honorable George Lawson (*acting.*)
The Honorable Paul Ivy Sterling.
The Honorable Christopher Temple.
The Honorable Henry B. Thomson (*acting.*)

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In an action against the owner of two vessels and their respective masters, an order was made affecting the 1st and 2nd defendants, who were reported not to be found in the District. The 3rd defendant appealed against this order.

Held, that as he was a party to the suit and, as master of the ship, was bound to maintain the interests of the owner, it was open to him, the 3rd defendant, to appeal against the order affecting the 1st and 2nd defendants.

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The degrees of liability vary according to the nature and habits of the animal, and the circumstances under which the injury was inflicted.

Where the animal is not of a genus naturally savage, and where the individual animal was not of mischievous habits, the owner's liability is limited to the value of the animal which did the injury.

But if the animal were of a savage genus, or if, though not of a savage genus, it were of mischievous habits, whether the owner knew those habits or not, the owner must make full compensation for the injury done by the animal, and cannot limit the damages to be assessed against him by the amount of the animal's value.

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District Courts have no power to issue writs of, or in the nature of writs of, *habeas corpus ad subjiciendum.*

It is "a very high prerogative writ by which the King has a right to enquire the causes for which any of his subjects are deprived of their liberty" (*Crowley's case.*)

It is a remedial mandatory writ.

A remedial statute should be liberally construed, and where the liberty of the subject is concerned, courts of law "are to struggle to secure it."

But as the court cannot *make* laws for this purpose an assumption of the right to issue this writ must rest on legal interpretation of existing statutes, and not on mere argument of inference, implication or convenience.

Neither the *Landraad Courts* under the Dutch Government, nor the *Provincial Courts* under the English regime, granted these writs.

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Held, also that the defendant, though a wrong-door in the sense of

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D. C., Kandy, 26,656 66

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C. R., Colombo, 3,103 71

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In a case of keeping a house for the purpose of promiscuous gaming, the evidence of the character and ownership of the house, as recorded in a connected case against those who were found gambling in that house, was put in as evidence in the former case, with the consent of the defendant, and on such evidence he was convicted. *Held,* that the reception of such evidence prejudiced the substantial rights of the defendant, and that the interest which the public has in the administration of criminal justice

required the error to be corrected, even though the individual consented to his own wrong, and evidence to be properly taken.

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In order to justify, under Ordinance No. 11 of 1843, cl. 12. [Ordinance No. 11 of 1868, cl. 106], a fine for a false charge, it should appear not only that the charge, when investigated, proved to be erroneous, but that it was false to the prosecutor's knowledge at the time when he instituted the proceedings.

In findin prosecutors, there out to be an express adjudication on the face of the proceedings that the prosecution was instituted on false, frivolous, or vexatious grounds as the case may be.

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A frivolous or vexatious arrest can only be an arrest malicious in its nature or without substantial ground of suspicion, or upon a charge plainly not an offence in law.

P. C., Kegalle, 6,546 88

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1.—*Gambling—Ordinance No.* 4 *of* 1841, *cl.* 19 "*Use.*"

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P. C., Matara, 27,115 24

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1.—*Crops of chenas—Lease—Ordinance No.* 7 *of* 1840, *cl.* 2.—"*interest in land.*"—

Whether a contract to lease the crops of certain *chenas* need be notarially executed as being "an interest in land."

An "interest in land" is not created by any contract, unless the contract confers an exclusive right to the land for a time for the purpose of making a profit of the growing surface.

The true question is, whether, in order to effectuate the intention of the parties, it be necessary to give the buyer an interest in the land, or whether an easement of the right to enter the land for the purpose of harvesting and carrying them away, is all that was intended to be granted.

C. R., Ratnapura, 1,056 101

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1.—*Custody of female child—Claims of stranger and of relative.*

Where a child's relative has consented to that child being taken at a time of its extreme need by a person who has maintained it, and is willing to maintain it, with all proper kindness, and in comfort and respectability, and where that relative after a long lapse of time comes forward at a very suspicious period of a female child's existence to claim possession of it, the Supreme Court will not misuse the writ of *habeas corpus* to take the child from a good and virtuous house, and deliver it over to misery and want, probably to vice, and certainly to grievous temptation.

In re Aysa Natchia 130

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Husband and Wife.

1.—*Delict of husband amounting to crime—Liability of wife's share*

The wife's share of the common property is liable for all contracts made by the husband; but her share is not liable, where the husband, being prosecuted criminally, is punished by sentence of fine or confiscation.

Neither is her share liable where he is used civilly on an obligation arising out of a delict amounting to crime.

D. C., Colombo, 26,414 94

2.—*Conjugal rights, restitution of—jurisdiction of District Courts —matrimonial suit—[Ordinance No. 11 of 1868, cl. 64.]*

A suit for the restitution of conjugal rights is not maintainable in Ceylon.

Though it is a "matrimonial" suit, it does not fall within the purview of cl. 24 of the Charter of 1833, the Supplemental Charter of 1843, and of Ordinance No. 12 of 1843, [cl. 64 of Ordinance No. 11 of 1868], inasmuch as the matrimonial suits contemplated therein were only such as were maintainable in Holland under the Roman Dutch Law.

Restitution of conjugal rights was not maintainable in the old Dutch Courts of the Island.

D. C., Galle, 17,665 } 133
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Immovable property.

d.—*Kandyan District—real estate—suit between English parties—English Law—deed affecting immovable property in Ceylon—its validity—place of execution—mortgage by executor and trustee—judgment against him—sale in execution held thereunder—action for ejectment—mesne profits.*

In an action to recover possession of real estate in the Kandyan District by English parties, whose rights were founded upon instruments made in the English form,

Held (there being no particular law in that District), that the principles of English law were to govern the rights of the parties to the suit.

According to the law in force in Ceylon, it is essential to the validity of a deed affecting immovable property that the deed should be executed in the Island.

One Duff having obtained judgment against D. B. Lindsay on a bond, dated 11th July, 1848, which purported to mortgage the Rajawelle coffee estate, sued out writs of execution and caused the said estate to be seized and sold by the hands of the Fiscal as the property of D. B. Lindsay; whereas in truth, the interest which the judgment debtor had in the property was as one of many trustees under a certain will. The proceedings too which resulted in the sale were found to be in breach of faith. Duff became the purchaser of the estate at the sale and subsequently sold it to Brown, Smyttan and Ingleton.

In an action raised by two of the surviving devisees in trust under the will aforesaid against the third surviving devisee (D. B. Lindsay) and Duff and two of his vendors, for rendering null and void the deed of 11th July, 1848, and all proceedings held thereunder, and for the further purpose of ejecting the vendees from the estate,—

Held, that plaintiffs were entitled to be restored to the possession of the estate ; that an account of mesne profits be taken as passed into the hands of Duff from 10th February, 1849, to 30th April, 1850, and of Brown and Ingleton from 1st May, 1850, to 21st May, 1853, and that the amount so ascertained be paid into the registry and be not paid out without due notice to Duff's vendees, until the expiration of six months from the date of the order of the Privy Council, with liberty to them to take such proceedings in the meantime as they may be advised for asserting their claim to the said moneys or to the estate &c.

D. C., Kandy, 26,656. 37

Injury.

See BRUTE ANIMAL.

Insolvency.

1.—*Europeans resident in Kandy—actual and matrimonial domiciles—European wife—Kandyan wife—postnuptial settlement—insolvency—fraudulent conveyance—certificate.*

A European having bought a cottage within the Kandyan District, out of certain moneys bequeathed to his wife by a third party and paid into his hands, executed a conveyance to her of that property, their matrimonial and actual domiciles being also in the Kandyan district,—

Held, that the Kandyan Law was applicable to the case, as being the law of their actual and matrimonial domicile, and that accordingly the European wife, as a Kandyan wife, had a separate estate in property coming to her, and that she could legally receive and hold property directly from her husband or any one else, whether by way of gift or under contract.

K. entered into an ante-nuptial agreement with his wife in 1855, agreeing to settle an annuity of £300 on her if she should survive him. In 1859, when in insolvent circumstances, he made a settlement on his wife purporting to convey to certain trustees in her favour a moiety of a certain coffee estate,—

Held, that the post-nuptial settlement was not in terms of the ante-nuptial agreement, but was intended to defraud his creditors and as such void.

Voluntariness of a conveyance, when coupled with insolvency, will invalidate the settlement.

A fraudulent conveyance, in the sense in which the term is used in bankruptcy law, is not sufficient of itself for the withholding of a certificate from the insolvent. There ought to be other circumstances, such as moral fraud, negligence in business, extravagance &c.

Kershaw's case 157

Interpretation.

1.—*Statute charging a burden on the subject.*

It is a well settled rule of law that every charge upon the subject

must be imposed by clear and unambiguous language, and even where there is an ambiguity found, the construction must be in favour of the public, because where the public are to be charged with a burden, the intention of the legislature to impose that burden must be explicitly and distinctly shewn.

C. R., Galle, 20,002 28

2.—*Penal Statutes—construction.*

The rule by which to construe Ordinances is to look at the precise words and to construe them in their ordinary sense, unless it would lead to any absurdity or manifest injustice, and if it should, so to modify, and vary them as to avoid that which would certainly not have been the intention of the Legislature.

P. C., Kegalle, 16,940 98

Intervention.

1.—*Practice.*

Where a party was allowed to intervene without shewing his interest by petition or motion, *held* that the Roman Dutch Law requires a party seeking to intervene to file his articles of intervention, shewing summarily his interest to justify such intervention. The practice in Colombo is for the intervenient to commence with his petition of intervention, which sets out his interest and ends with a prayer asking for leave to intervene and that his petition may be accepted and parties noticed thereon.

D. C., Kandy, 30,819 22

2.—*Practice—when intervention allowed.*

An intervenient should not be allowed as a matter of course to intervene in a case. He should summarily shew his interests in the cause before he is allowed to intervene.

As a general rule, an intervenient ought not to delay a case. He should take it up in the stage in which he finds it.

D. C., Jaffna, 8,178 80

3.—*When allowed.*

The principle of the law of intervention is that if any third person considers that his interest will be affected by a cause which is depending, he is not bound to leave the case of his interest to either of the litigants, but has a right to intervene or be made a party to the cause, and to take on himself the defence of his own right, provided he does not disturb the order of the proceedings.

It is not proper to allow an intervenient to come in to defend his own rights and then to suffer him to be put out of Court by the renunciation and disclaimers of the original parties.

C. R., Chavakachcheri, 961 87

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1.—*General judgment—liability thereon of several defendants.*

Where a general judgment has been obtained against several defendants, each of them is liable only for his share and cannot be called upon to pay the whole debt *in solido.*

D. C., Kandy, 26,656 54

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Kandyan Law.

1.—*Beena husband—his interest in wife's estate.*

A *beena* husband has no right to, or interest in, his wife's estate, after her death.

Qu.? Whether he has an interest in the property acquired during coverture.

D. C., Kandy, 338. 5

2.—*Deed of gift—clause of disinherison.*

A Kandyan having executed a deed in certain terms, making over and granting in *paraveny* to his second wife and children begotten by her, certain lands, died. In an action raised by his issue by the first bed for an undivided moiety of the lands which had been taken possession of by the surviving widow and her children, under the instrument aforesaid,

Held that it was not a last will, but a deed of gift, and that as such in order to be valid, it must not only contain a clause of disinherison but must set forth the reasons of the disinherison.

D. C., Kandy, 27,150 followed
D. C., Kandy, 34,395 108

3.—*Practice—non-joinder of Kandyan widow—her interest in estate of deceased husband.*

Where a widow has been already provided for by the will of her husband, and has no interest in the subject of the suit,it is not necessary in a case brought by the heir for the recovery of certain mesne profits, to make her party plaintiff with him.

All that a widow is entitled to is maintenance and support, and for this purpose she may receive from the heir either a portion of the produce of the deceased's *paraveny* lands, or she may have the temporary possession and usufruct of a suitable portion of such lands ; and in the latter case, the heir-at-law shall perform the *rajakaria* or personal service due on account of that portion.

Semble, she must be joined as plaintiff, if the lands in suit were the

acquired property of the testator, for in such a case, she has a life-estate in them.

C. R., Ratnapura, 662½ 112

See Insolvency.
Mural Inscriptions.
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Kandyan territory.

1.—*Headman's lands in—Proclamation, 21st November* 1878, *cl.* 23.

The immunity from taxation given to the chiefs, under cl. 23 of the Proclamation of 21st November, 1883, is a personal immunity, and not one given to the lands which they hold in the district where they bear office.

C. R., Harrispattu, 2,477 146

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1.—*In pari delicto, potior est conditio possidentis*
2.—*Interest reipublicæ ut finis sit litium*
3.—*Actus curiæ nemini facit injuriam.*

Legitimacy.

1.—*Presumption of—married woman.*

The law in certain cases recognises a conclusive presumption in favour of legitimacy.

Where the husband and wife have cohabited together and no impotency is proved, the issue is conclusively presumed to be legitimate, though the wife is shewn to have been at the same time guilty of infidelity.

And even where the parents are living separate, a presumption of legitimacy arises so strong that it can only be rebutted either by proof of previous divorce, or by cogent and almost irresistible proof of non-access in a sexual sense. Nor is the fact that a woman is living in notorious adultery in itself sufficient to repel this presumption.

P. C., Colombo, 59,202 90

Maintenance.

1.—*Married woman—separation from husband—proof of illegitimacy—evidence of parents to bastardise issue.*

Where a married woman, living separately from her husband, brought a charge of maintenance against a third party, and it became incumbent on her to prove the illegitimacy of the children, *held*, that the conduct of the parents as to whether they had or had not connexion was inadmissible, not only all direct questions respecting access, but all questions which have a tendency to prove or disprove that fact, unless they are put with a view to some different point in the cause.

It is permissible for the woman to confess her adulterous connexion

after the fact of her husband's non-access has been established by independent evidence.

P. C., Colombo, 59,202 90

See LEGITIMACY.

Master and Servant.

1.—*Action for wages.—plea of forfeiture*—[*Ordinance No.* 11 *of* 1865, *cl.* 11.]—*rights of master.*

A master when sued for wages, may avail himself of either the common law defence or the statutory defence.

Under the common law, a master may discharge without notice a servant guilty of gross misconduct and the servant so discharged is not entitled to any wages that have not previously accrued due ; under the Ordinance, in an action for wages, a master may make abatement therefrom on account of the servant's absence from or neglect of work, and also for the value of breakages or damage done to the employer's property, through the servant's misconduct, gross negligence or carelessness.

If under the Ordinance the master wishes to enforce his rights, he must institute a proper proceeding and not decide for himself that a forfeiture of wages has been made.

C. R., Jaffna, 27,355. 193

Mayoraal.

1.—*His duties—nature of.*

The office of *mayoraal* in the district of Matara is not hereditary.

His duties consisted in superintending the culture of fields ; estimating the crop for taxation ; signing the *wattooroos* upon which the Government share is farmed out ; furnishing returns of crown lands when ordered, and attending at rent sales &c.

D. C., Matara, 19,487 106

Mesne Profits

1.—*Mesne profits—Costs under* £10—"*debts contracted*"—*Ordinance No.* 7 *of* 1853, *cl.* 164—*Arrest against person.*

Mesne profits and costs fall within the description of "debt contracted" under the 164th clause of Ordinance No. 7 of 1853, which disallows arrest against the person for sums under £10.

D. C., Kurunegala, 14,015 27

2.—*Mesne profits—damages—prescription.*

Mesne profits, being in the nature of damages, can be recovered only subject to the provisions of the Prescriptive Ordinance.

C. R., Ratnapura, 662½ 112

3.—*Action to recover—Prescription.*

A party may sue for mesne profits, even though in a former suit for

the land, he declared for mesne profits, but gave no evidence thereon. But he can only recover under the Prescriptive Ordinance.

D. C., Badulla, 15,471 143

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1.—*Custody of children.*

The maternal grandmother is entitled to the care of the children in preference to their father.

In re *Aysa Natchia.* 88

2.—*Custody of child—Liability of father to maintain it.*

The grandmother of a Mohamedan child is entitled to its custody on the death of its mother.

The right of the grandmother to such custody is given on the child's behalf, not on behalf of the grandmother. It is the child's privilege.

The obligation of providing for the child's maintenance is paramount on the father, although the grandmother has the custody of the child, and the father wishes to have it in his own.

D. C., Colombo, 29,370 144

Mistake.

1.—*Voluntary payment—Payment to public officers under compulsion.*

Money voluntarily paid by a party who is under no mistake cannot ordinarily be recovered back.

But there is a distinction between the case of money paid upon a claim made by a public officer who has the power of summarily enforcing his claim without reference to the ordinary legal remedies, and money paid under a claim by a private individual who has no power of enforcing it except by adopting those remedies. In the former case, it is obviously inequitable that the public officer should retain what he thus acquired. In the latter case, if the party paying was not deceived, he is not entitled to recover.

C. R., Galle, 20,002 28

2.—*Payment under protest—relation of priest and congregationalist.*

A payment under protest to a priest by a member of his congregation, is recoverable in equity if undue influence has been used, or improper advantage taken of the peculiar relation existing between the parties.

C. R., Kalutara, 12,546 34

Mortgage.

1.—*Mortgage—assignment from creditor made in pursuance of agreement entered into long after payment—advances for cultivation of estate—prior special mortgage—preference.*

On 23rd October, 1857, E mortgaged to M and M a certain coffee estate. stipulating payment to them of the principal amount, £6000, by five equal instalments of £1,200 each payable yearly between, 1859 and 1863. He also executed two other mortgages to S on the 23rd December, 1858, and 15th August, 1859, respectively, for sums aggregating £3,000; and also a fourth mortgage to L on the 24th December, 1859, agreeing with L that L was to carry on the cultivation of the estate and pay to M and M the instalment due in January, 1860, upon their bond. L who had no notice of either of the mortgages in favor of S, paid to M and M the instalment aforesaid with the interest due, on £1,536, but did not take an assignment therefor until the following year, 1861, when E's fraud was discovered.

On the 25th March, 1861, M and M recovered judgment against E for the balance £3,600 still due to them on the bond, and assigned their interest therein to S. S thereupon sued out writs of execution and became the purchaser of the estate for £7,500. L now claimed out of the proceeds sale the sum of £3,157 as due under his bond for advances made by him to carry on the cultivation of the estate, and for money paid to M and M in respect of the instalment of 1860.

Held, (1) that L was not entitled to rank before S with regard to the claim for £1,536, either under the assignment from M and M or independently thereof;

And (2) that L had no claim in preference to S in regard of the sum paid by L for the cultivation and improvement of the estate, either by virtue of a tacit hypothec or under the bond of 24th December, 1859.

D. C., Colombo, 29,669 148

See Partnership, 1.

Mural Inscriptions.

1.—*Evidence—admissibility of copy.*

A Kandyan King granted certain lands to a Buddhist temple, making an inscription of the grant on the rock wall of the temple. The mural inscription was admitted to have been copied from a *puskola* deed. *Held* that the mural inscription in the absence of the *puskola* deed, the non-production of which was satisfactorily accounted for, was admissible in evidence, by means of a duly transcribed copy.

D. C., Kandy, 30,917 2

Namptissement.

1.—*On what documents allowable.*

Where an instrument which forms the basis of an application for provisional judgment is one which, according to plaintiff's own shewing,

is not so complete in itself as to raise a strong presumption in favour of plaintiff's claim, but is connected with others and calling for further inquiry, namptissement should not be granted upon it.

D. C., Colombo, 27,514 20

New trial.

1.—*New trial—grounds for.*

Where for several months after evidence was taken, the court did not pronounce judgment, and the judgment it pronounced is not strongly in favor of plaintiff, *held* a new trial was necessary.

C. R., Chavakachcheri, 864 129

Nindegama.

1.—*Nature of—tenure of service.*

The owner of a *nindegama* may alienate it by sale, with all the rights incident thereto, and the purchaser may hold as fully as the last owner.

Semble—the fact of the purchaser not being domiciled in the Kandyan provinces, is no objection to his exercising proprietary rights over the *nindegama.*

Qu? Whether the new proprietor can exact the services, if he be of a caste inferior to that of the tenant.

D. C., Ratnapura, 7,126 114

Ordinances.

1834, No. 8, cl. 2, [1871, No. 22, cl. 3].
See PRESCRIPTION.
SERVITUDE.

1840, No. 7.
cl. 2, *See* CONTRACT, 2.
GROWING CROPS.

1841, No. 4,
cl. 19, *See* GAMBLING.

1843, No. 11,
cl. 12, [Ordinance 1868, No. 11, cl. 106].
See FALSE PROSECUTION.

1843, No. 15,
cl. 20, [Ordinance 1861, No. 11, cl. 167],
See FRIVOLOUS AND VEXATIOUS ARREST.

1844, No. 10,
cl. 32, *See* ARRACK, 2.

1846, No. 12,
cl. 24, [Ordinance 1865, No. 16, cl. 89].
See PUBLIC WORSHIP.

1852, No. 5.
cl. 1, *See* RECONVENTION.

— No. 18.
cl. 96, [Ordinance 1869, No. 17, cl. 115].
See CUSTOMS ORDINANCE.

1853, No. 7,
cl. 164, *See* ARREST FOR DEBT.
COURT OF REQUESTS.

1861, No. 22,
cl. 17, [Ordinance 1867, No. 4, cl. 17].
See TOLL.

1865, No. 16,
cl. 66, *See* CONTRACT.
See DISTRICT COURT, 1.

INTERPRETATION.

Paddy and dry grain Ordinance.

1.—*Prosecution thereunder—exemption from tax.*

P. C., Kalutara, 22,777. 1

Partnership.

1.—*Loan to partner—mortgage by him of partnership property—power of attorney—subsequent ratification—benefit of the firm.*

Where a partner holding a power of attorney of his co-partner, pledges and delivers partnership property, for the security of loans advanced to him in his own name, and the acts of the partner were subsequently ratified by the firm, the pledger was held entitled to hold the property so pledged to him, until the advances made thereon by him had been satisfied.

The presumption of fraud or misapplication was held rebutted by the particular circumstances of the case.

D. C., Kandy, 31,273 9

Payment.

See MISTAKE.

Planting Share.

1.—*Custom.*

It is an acknowledged custom of the country that persons who have entered upon land with consent of the owner, and have actually planted it with cocoanuts, are entitled to a share of the trees when they come into bearing.

They may claim this by operation of law, and not as a consequence of the terms of any agreement between them and the owners.

C. R., Calpentyn, 17,716 113

Pleadings.

See Procedure 4.

Police court.

1.—*Practice—plaint by whom to be laid—power of Court to reopen order of dismissal—amendment of plaint.*

P. C., Jaffna, 1,882 180

2.—*Posponement of cases.*

P. C. Chavakachchari, 19,860 91

See Arrack.
Customs.
Frivolous or vexatious arrest.
Gambling.
Maintenance.
Procedure (Criminal.)
Public worship.
Resistance.
Trespass.

Police Force.

1.—*Quartering of.*

See Proclamation.

Possession.

See Prescription.

Possessory action.

1.—*Its nature—practice.*

The possessory action of the Roman Dutch Law lies only where a party who has had possession for more than a year and a day is dispossessed by force. It is a summary remedy, and judgment given in it in no way determines the title to the land, but leaves that an open question.

C. R., Balap. Modera, 9,163 22

2.—*Possessory right—evidence—R. and O. 2nd July*, 1842.

An action founded upon one's possessory right by reason of a year and a day's possession may be maintained against a mere wrong-doer.

Under the R. and O., 2nd July, 1842, documentary evidence which had not been filed in the case, do not for that reason become inadmissible at the trial. The judge has always a discretionary power to admit a right.

D. C., Mannar, 5,632 195

Prescription.

1.—*As to lands and immovables.*

"Possession for ten years previous to the bringing of action," (cl. 2 of Ordinance No. 8 of 1834) is not possession *next* before the bringing of the action.

C. R., Point Pedro, 41 75

2.—*Nature of prescriptive possession.*

There are two points regarding the law of prescription that should be always well borne in mind : the first, that a possessor is always presumed to hold in his own right and as proprietor, until the contrary be demonstrated. The second, that the contrary being once established, and it being shewn that the possession commenced by virtue of some other title, such as that of tenant or planter, then the possessor is presumed to have continued to hold on the same terms, until he distinctly proves that his title has been changed.

D. C., Negombo, 419... 145

3.—*Effect of nonsuit.*

A former case though a nonsuit, bars prescription (Creasy C. J., *dubitante.*)

D. C., Jaffna, 9,601 189

4.—*Acknowledgment of right.*

Prescriptive possession will not avail, if within that period, the title deed of the opponent has been acknowledged to be valid.

D. C. Batticaloa, 13,452. 189

See SERVITUDE.

Priority.

See MORTGAGE.

Principal and Agent.

1.—*Purchase of land—fraudulent transfer of property in agent's name—action for cancellation of deed.*

A supplied B with the necessary funds and deputed him to purchase a land and obtain a conveyance thereof in A's favour ; but B in breach of trust had the deed executed in his own favour. On A. suing B, *held*, that petitioner was entitled to have defendant's deed cancelled and to have a reconveyance of the premises to the plaintiff at defendant's expense.

D. C. Negombo, 23,754 6

Probate.

See WILL, 1.

Procedure, Civil.

1.—*Special judgment—construction.*

Where a judgment declared a party "entitled to, and to be placed in possession of the land," *held* that such judgment authorised the ejectment of the defendant therefrom.

D. C., Colombo, 21,041 8

2.—*Party in default to plead—putting him on terms—order of court.*

In all cases where a party in default is allowed fresh time to plead, if it is intended that, in default of such pleading being filed within the time allowed by the court, judgment should be entered for the opposite party without further notice to the party in default, such condition should be expressly set out in the order allowing time to plead.

D. C., Jaffna, 10,336 25

3.—*Pleadings insufficiently stamped—procedure to remedy—nature of order of court.*

Where pleadings are insufficiently stamped, the proper course is to apply to the court by motion, or to obtain a rule to shew cause why the additional stamps should not be supplied within a given time.

An order allowing additional stamps, to be supplied, does not mean that the additional stamps should be affixed to the pleading, but that the party whose pleading is insufficiently stamped should apply for additional stamps under cl. 7 of Ordinance No. 19 of 1852. That application necessitates the payment of a penalty of £10. It will be for the party in fault to consider whether it will be better for him to pay the penalty or commence his suit *de novo.*

[*See* cl. 38, 39 and 40, of Ordinance No. 23 of 1871.]

D. C., Jaffna, 10,853 104

4.—*Claim in execution—claimant out of possession—evidence of title.*

A claimant in "execution" must give proof of title in all cases where he is not reported to be in possession. 188

See Right to begin.
Kandyan Law, 3.

Procedure, Criminal.

1.—*Prisoner under sentence of death—escape from custody—re-arrest—application by Queen's Advocate for writ of habeas corpus—power of Supreme Court to award execution.*

Where a prisoner under sentence of death escapes from custody and is re-arrested, he has a right to have an opportunity of pleading non-identity.

The proper course in such a case is for the Queen's Advocate to have

the prisoner before the Supreme Court on a writ of *habeas corpus,* so as to be able to obtain a rule *nisi* on him for awarding execution.

The Supreme Court has the power to grant writ of *habeas corpus* for the purpose.

In re Valayudapody 186

2.—*Irregularity—summons—binding over to keep the peace—conduct before J. P.*

P. C. Trincomalee, 1549 188

3.—*Irregularity—want of summons—pleadings over—consent.*

It is irregular to try an accused person without service of proper summons on him. The defect is not cured by his pleading over.

P. C., Kegalle, 18,266 194

See POLICE COURT.

Proclamation.

1818, November, 21.

See KANDYAN TERRITORY.

1848, August 7.

Construction of.

C. R., Galle, 20,002 28

Proctor.

See APPEAL PETITION, 3.

Promissory Note.

1.—*Illegal consideration—annulment of insolvency proceedings—forbearance in opposing certificate.*

Where a promissory note was granted for the consideration that the payee would bring about the annulment of certain insolvency proceedings against a third party, and would forbear opposing his certificate, *held* that such consideration was illegal.

D. C., Colombo, 26,795 81

See EVIDENCE, 3 and 4

Provisional Judgment.

See NAMPTISSEMENT.

Public Worship.

1.—*Disturbance of*—[*Ordinance No.* 16 *of* 1865, *cl.* 89]—*nature of service—"any place of christian worship."*

A christian congregation, assembled in their regular place of worship to join in public prayer, and to listen to the religious exhortation of their minister, is assembled for the performance of "public worship," within the meaning of the Ordinance.

The words "*any* place of christian worship, &c.," are general and do not mean any place where a police force is established.

Purchase and Sale.

1.—*Sale of land—warranty of title—claim for value, and compensation for improvement.*

A having bought of B a land with warranty of title, built a house on it, but suffered eviction therefrom by a title superior to his vendors. *Held*, that A. was entitled to recover both the purchase money and the value of the house.

C. R., Kegalle, 1,047 93

See Principal and Agent.

Recognizance.

1—*Forfeiture of—levy under warrant of distress*—Ordinance No. 6 of 1855, cl. 11—*procedure.*

D. C., Galle, 9,501 147

Reconvention.

I.—*Claim for freight—claim in reconvention for damages to cargo and for short delivery—cross action—set off pleading—Ordinance No.* 5 *of* 1852, *cl.* 1.

Reconvention is equivalent not to set off, but to cross action

A claim for freight may be met by a cross action for damage to cargo and short delivery, though it is discretionary with the Judge, if he think the claim in reconvention to be dubious and dilatory, to disallow it, with liberty to defendant to reserve his claim for an independent suit.

Ordinance No. 5 of 1852, cl., introducing the law of England as to maritime matters, does not exclude the power of pleading in reconvention anything that could not have been pleaded in England by way of set off.

D. C., Galle, 20,467 191

Right to begin.

1.—*Right to begin—appeal—discretion of presiding judge.*

The right to begin, the order in which parties are to call evidence, and all similar matters as to the conduct of a cause are things in which the presiding judge ought to be invested with very large discretionary powers, and the Supreme Court will not interfere with the mode in which these discretionary powers have been exercised, except in cases of gross error and of serious hardship arising from such error.

D. C., Kurunagale, 15,830 143

2.—*Right to begin—appeal.*

A District Judge ought not to have made an order as to the right to begin, and then suspended the proceedings to remit an appeal against such order.

D. C., Jaffna, 11,493 145

Sannas.

1.—*Mode of proving the genuineness of sannasses.*

D. C., Kandy, 28,620 4

See MURAL INSCRIPTIONS.

Sequestration.

1.—*Grant of second sequestration.*

Circumstances under which a second sequestration of property belonging to defendants was held unjustifiable.

D. C.. Colombo, 26,952 30

Servitude.

1—*Right of way possession*—Ordinance No. 8 of 1834, cl. 2 [cl. 3 of Ordinance No. 22 of 1871.]

A right of way is a proverbial servitude and as such "immovable" Enjoyment of a right of way is included in the words "*possession* of lands or *immovable* property," in cl. 2 of Ordinance No. 8 of 1834, (cl. 3 of Ordinance No. 22 of 1871.)

C. R., Point Pedro, 41. 75

Shipping.

1.—*Master and consignee—action for breach of contract—bill of lading—written agreement—evidence—implied promise.*

In an action brought by the master of a ship against the consignees of certain machinery for breach of a contract to discharge the said machinery within reasonable time after the arrival of the ship in Colombo, it appeared in evidence that the bill of lading signed by the master, though in the usual form, contained a marginal note which referred to a written agreement. *Held* that, in the absence of the written agreement, an implied promise on the part of the defendants, to unload with due diligence, could not be inferred from their acceptance of the goods under the terms, of the bill of lading.

D. C., Colombo, 27,010 25

2.—*Shipping—shipowner and merchant—time of payment of freight charterparty—deurrage—interest thereon.*

In the absence of an express stipulation as to the time and manner of payment of freight, the master is not bound to part with the goods until his freight is paid.

Where according to the charterparty, the merchant was bound to take the cargo alongside and from the ship's tackle, but did not, *held* he was liable to pay demurrage.

But such demurrage does not carry interest.

D. C., Galle, 20,283 141

See RECONVENTION.

Tenure of land.

See "MAYORAAL."
"NINDEGAMA."

Toll.

1.—*Removal of bar—fine.*

No fine attaches, when the toll bar has been put in a place different from that appointed by the Proclamation.

P. C., Kalutara, 26,639 129

2.—*Evasion of—cl.* 17 *of Ordinance No.* 22 *of* 1861 [*cl.* 17 *of Ord. No.* 4 *of* 1867.]

The words "not being a public highway" are to be read in conjunction with the word "land," and not with the word "road" which in that connection means the turnpike road itself.

If there is a public highway running out of the turnpike road, a traveller may turn off into that public highway without being liable; but if he shirks the toll by turning off the turnpike road over any adjacent land, not being the soil of a public highway, he is liable to the penalty.

P. C., Negombo, 263 143

Tortious legal proceedings.

1.—*Want of corrupt motive—damages.*

Where no malicious or corrupt motive in prosecuting an action was alleged or proved, no action for damages will lie, even though inconvenience and pecuniary loss have been caused.

D. C., Colombo, 24,345 35

Trespass.

1.—*Cattle damage-feasant—damages.*

The owner of cattle damage-feasant is liable to pay all damages which are the natural and probable consequences of his allowing his cattle to stray on another's land, but not damages which are the remote or accidental consequences of such act.

C. R., Newera Eliya, 2,576 19

2.—*Its nature.*

When of a civil or criminal nature.

P. C. Jaffna, 27,760 35

3.—*Who may maintain.*

Any possession of real property is sufficient to entitle the possessor to sue a mere wrong-doer. If the plaintiff had no occupancy or actual possession but had merely the right to go to the estate occasionally for the purpose of inspecting it, or some other temporary purpose, he cannot maintain the suit.

D. C., Kandy, 30,033 192

Voluntary payment.

See Mistake, 1.

Will.

1.—*Form of—when admitted to probate.*

An instrument, whatever be its form, may be admitted to probate as testamentary if there is proof, either in the paper itself or from clear evidence *dehors*, first, that it was the intention of the writer of the paper to convey the benefits by the instrument which would be conveyed by it if considered as a will; secondly, that death was the event that was to give effect to it.

D. C., Kandy, 314 17

Witness.

1.—*Batta.*

Batta and expenses of witnesses when allowable in case of postponement of case.

D. C., Colombo, 19,758 29

CORRIGENDA.

PAGE.

7.—*dele* the arguments of counsel.

104—line 17 from bottom—*dele* 'to be unavailable.'

112—line 11 from bottom—for *defendant* read *plaintiff.*

163—line 22 from top—for *was* read *were.*

1860.

10th January.

Present:—Sterling, A. C. J., Morgan, J. and Lawson, J.

The Honorable Richard Francis Morgan and George Lawson Esquire, produce their warrants of appointment and take their oaths as Acting Senior Puisne Justice and Acting Junior Puisne Justice respectively.

P. C. Kalutara, No. 22777. *Fernando v. Tissera.**

The Supreme Court held as follows:—

Paddy and dry grain Ordinance—exemption from tax

The title deed relied upon does not, in the opinion of the Supreme Court, establish the exemption which the defendant claims.

The Proclamation of the 3rd May, 1800, freed the tax which all lands within these settlements had to pay to Government, (see sec. 1, 8 and 10). Another dated at the 22nd April, 1803 directs that "in all cases where no share of the produce of the land transferred shall have been reserved to Government by any specific grant or title, or by any general Legislative provision, a share is to be reserved for Government," which is fixed at one-fifth in some and one-tenth in other places.

The Proclamation of the 2nd March, 1824, expresses the intention of Government strictly to enforce and levy the fixed duty due to the Crown from the annual produce of all grounds ; and whilst it exempts lands planted with coffee, cotton or pepper, expressly provides that nothing in it, the said Proclamation, contained shall be "construed or taken to affect or extend to any low lands applied to the culture of paddy."

It has also been the invariable custom in this country for paddy lands to pay a share of the produce to the Government.

The Ordinance No. 14 of 1840 provides that "there shall continue to be levied by, and payable to, Government, a tax of one-tenth, or such other proportion, of the crops of paddy and dry grain in and upon all lands now liable thereto as by law, custom, or usage, is at present levied or payable."

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* The record of this case is not forthcoming and is said to have been lost. The prosecution appears to be under cl. 14 of the Ord. No. 14 of 1840.

1860. Jany. 18. — Under these circumstances, express words of relief will be necessary to exempt the land of the defendant from the usual payment. So far from any such occurring in the deed now in question, it is distinctly stipulated therein, that "the land shall be " liable to such regulations as now exist, and as may hereafter be " enacted relative to landed property in general."

18th January.

Present:—Sterling, A. C. J., Morgan, J. and Lawson, J.

D. C. Kandy, No. 30,917. } *Yattewatta v. Gordon.*

Evidence—Mural inscriptions—Ancient deed.

This was an action of ejectment. Plaintiff, alleging himself to be the chief priest of the Asgeri Wihare, based his title to the land in question on a royal *sannas* or grant to the temple of which he was the present incumbent. Defendant claimed the land by virtue of two crown grants. The crown intervened in support of defendant's title.

The *sannas* relied upon by the plaintiff was inscribed on the back of the rock-wall of the temple and purported to be a dedication to the temple by the late King of Kandy, Sree Wickrame Raja Sinha, and his mother.

The learned District Judge in an elaborate judgment held (1) that there was an inscription on the rock wall, containing the words set forth in the Sinhalese document filed in the case; (2) that that inscription constituted a royal *sannas* or grant of the lands therein named to the temple; and (3) that the temple had not lost its title; and he accordingly decreed that the defendant be ejected from the premises.

On appeal, the *Queen's Advocate* and *Berwick, D. Q. A.* appeared for the intervenient and appellant; and *Dunuwille* for respondent.

The following is the judgment of the Supreme Court:—

The Supreme Court entirely approves of the finding of the District Judge, as to the genuineness of the mural inscription on which the claim of the plaintiff is founded, and concurs generally with him iu the reasons adduced by him in support of this conclusion. Upon this subject it is unnecessary to add anything; and it only remains to notice the objections, which have been raised at the bar, relating (1) to the admissibility of the document in question in evidence; (2) to its legal validity and effect; (3) to its application to the land in dispute; (4) to the want of possession under the deed; (5) to the character in which the present plaintiff sues.

1860. Jany. 18.

1. It is objected that the mural inscription ought not to be proved in evidence, because it is not an original document, the transfer intended by the King of Kandy having, as it is alleged, been completed by the *puskola* deed, of which the inscription is a copy. The Court is rather of opinion that the inscription on the rock should be considered as the original and principal document, being intended by the King to remain as a perpetual memorial of his donation, and that the *puskola* deed should only be regarded as the rough draft, from which the principal deed was to be copied; but it is needless to decide this point because this Court is clearly of opinion that, if the *puskola* deed is the original, and the rock inscription the copy, there is sufficient evidence to account for the non-production of the former, and to establish the accuracy of the latter. It is reasonable to conclude that the *puskola* would be regarded as superfluous after the completion of the inscription; and the plaintiff tells us that there are no deeds relating to the Alut Wihare except the rock inscription. The Supreme Court cannot think it necessary that search should be made amongst the the title deeds of the other priests of Asgiri Wihare, who are the incumbents of other temples connected with that establishment, but in no way interested in the Alut Wihare, nor likely to have custody of its title deeds; and this is the only search which has been suggested at the bar as necessary. The accuracy of the copy is proved by the comparison made between it and the *puskola*, in the presence of the King, which resulted in the King bestowing praises on the stone cutter for the fidelity of the transcription.

2. It is said that the deed can have no legal force or validity, because it excepts the *muttettoo* lands from the operation of the grant, and consequently reserves to the King the former services of the *nilacarayas*, and at the same time grants the other lands of the village to the temple, thereby creating a claim on its part to new services, in addition to the old, which, as it is urged, would be beyond the power of the Crown. This Court must put such a construction upon the deed as may give it some force and meaning, rather than one which would render it inoperative; and if the construction contended for would have the effect attributed to it, the Supreme Court must hold that the reservation of the *muttettoo* fields was intended merely to apply to the land, and not to the services incident to it. Further, it is argued that the deed is void, because it purports to be the act of the Queen-mother, and her consent to it is not proved; but this Court holds that her presence in the temple, when the grant was made by the King in her name, is sufficient proof of her acquiescence in the grant, and of his having acted under her authority.

3. It is contended that the services in question relate only to a portion of the land in dispute, and that the intention of the king

1860. Jany. 18. — and Queen was to grant only such portion of the high lands of Udu Asgeria as were appurtenances of the paddy field, transferred to the temple. This is the most substantial of the objections raised by the counsel, but an inspection of the transfer deed will prove that the grant cannot be limited. The Queen grants to the temple from the village Udu Asgeria, the fields included within certain specified boundaries, excepting the *muttetoo* fields, and adds a grant of all the high and low grounds, intending, as the Court is clearly of opinion, to transfer the whole of the royal chenas and other high lands in the village to which the Crown was entitled, except the appurtenances of the *muttetoo*, if any such there be, of which this Court has no proof. There are no words to limit or confine the expression "together with the high and low lands out of the village Udu Asgeria," so as to exclude from their operation any land within the village, the property of the donors, except the *muttetoo* and its appurtenances. If there be, as suggested, other private and temple lands within these boundaries, this judgment is not binding with respect to them, and gives only to the temple what the King and Queen gave, and had the power to give.

4. It is argued that an ancient deed should be accompanied by proof of possession thereunder, and that such proof is wanting in the present case ; but the Supreme Court is of opinion that there is proof, both of ancient and modern possession under the deed, and of the performance of service to the temple, sufficient to shew that the deed was acted on, and that further proof of possession is not required.

Lastly, it is objected that the plaintiff sues as the priest of the Asgiri Wihare, and that he only proves title as priest of the Alut Wihare. The fact is that plaintiff holds both offices, and the objection as to the pleading would be met by a slight alteration of the libel ; but the Supreme Court is of opinion that no such amendment is necessary, as it is proved that the Alut Wihare is the property of the Asgeri Wihare, and therefore that the priest of the latter has a right to sue for the injury done to the former, by which the interest of his own temple is prejudiced.

D. C. Kandy, No. 28620. } *The Queen's Advocate v. Gordon.*

Sannas—genuineness of. The Supreme Court is of opinion that further evidence may be adduced to throw light upon the genuineness of the *sannas.* This evidence should relate to the language in which the *sannas* is expressed, and its correspondence with the style in use in like instruments of the same period ; and the opinion of learned persons skilled in the Pali language should be taken on this point ; it

should also be ascertained whether the description of the high lands by boundaries, as given in this *sannas*, was customary, and comparison should be made with other *sannases* of unquestioned genuineness.

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The evidence should shew in what custody the *sannas* has remained, and should account for the long delay in giving notice of its existence.

26th January.

Present :—STERLING, A. C. J. and MORGAN, J.

D. C. Kandy, No. 338. } *In the matter of the Intestate Estate of Mollegodde Coomarihamy, deceased*

Kandyan law—*Beena* husband—Administration—Practice in appeal.

This was a contest for letters of administration. There were four applicants, the first being the paternal aunt, the second the *beena* husband, the third the half brother, and the fourth the sister of the intestate.

The District Judge granted the letters to the first applicant.

On appeal by the beena husband, *Edema*, *Lorenz* and *Rust* appeared for him, and *Dias* for respondent.

The Court held as follows:—

The Supreme Court coucurs with the District Court in finding that the *beena* husband has no right to, or interest in, his wife's estate after her death. Such has always been the received construction of the Kandyan law on this subject, and the Supreme Court has failed to discover any good reason or authority to induce it to doubt the correctness of such construction. The case in the Judicial Comissioner's Court, (*Diary*, August, 1829, No. 3133.) referred to by the learned counsel for the appellant, (the 2nd applicant), would seem to depend more upon the construction given to the deed referred to in the judgment, than to a deliberate consideration of the abstract law on the subject.

It has been urged in support of the appeal that the *beena* husband has, at least, an interest in the property acquired during coverture. This plea was only taken however in the petition of appeal ; the only question submitted to the District Court, at the hearing, having been, that relating to the interest of a *beena* husband in his wife's estate. This plea involves an issue of fact, and the Supreme Court cannot allow the appellant to take it for the first time in appeal.

In his original application, the appellant relied upon a deed, by which his wife was said to have conveyed all her property to him. This deed, if established, would have given the appellant an all-sufficient interest in his wife's estate, and an undoubted right to

1860 Jany. 28. — represent the same. Its genuineness was however denied by the respondent, and yet, at the trial, the appellant called no evidence to prove that deed.

Under these circumstances, and considering the necessity of a speedy decision in these administration suits, and that an affirmance of this order will not deprive the appellant of an opportunity to establish, if able to do so, his interest in his wife's estate, either under the deed, or in respect of the property acquired after converture, the Supreme Court considers that the order of the District Court should be, and the same is hereby, affirmed. Costs to be paid out of the estate.

28th January.

Present:—Sterling, A. C. J. and Morgan, J.

D. C. Negombo, No. 23,754. } *Zefferino Godinho v. Perera and others.*

Aliens—right to hold lands, and to sue.

The plaintiff, (a Goa priest, who had been resident in Ceylon for 20 years,) sued in ejectment under the following circumstances. On the 23rd January, 1851, the plaintiff purchased a garden for £150 aud employed his servant, the first defendant, to get the deed of sale drawn in plaintiff's favor, but the first defendant, with a view to defraud the plaintiff and in breach of the confidence reposed in him, procured the vendor to execute the deed in his, the defendant's, own favor.

Shortly after the execution of the deed, the plaintiff discovered the fraud, and threatened to charge the first defendant before a justice, but at the earnest request of the first defendant and one Cassimero not to expose the first defendant, the plaintiff desisted on the first defendant's solemn promise not to dispute the plaintiff's right to the land, or to disturb his possession thereof. The plaintiff alleged that since 1851 he remained in possession of the land till November, 1857, when the first defendant having attempted to set up in himself a title, he, the plaintiff, was obliged to institute the present suit. The plaintiff prayed for a declaration of his right to the land and for a cancellation of the deed in favor of the first defendant.

The defence set up was that the land was purchased by the first defendant, and that he borrowed the purchase money from the plaintiff; that out of the money so borrowed (£150), he, the first defendant, paid plaintiff £110, leaving a balance of £40 still due, which he, the first defendant, offered to pay to plaintiff. Upon these pleadings, the case came on for trial, and several witnesses were called by the plaintiff to prove the allegations in the

libel. The defendants called no witnesses, but it was contended for him that the plaintiff, upon his own admission, being an alien, could not hold real property in Ceylon, and therefore could not maintain the action. 1860. Jany. 28.

The District Judge over-ruled the objection on the authority of *Mayor of Lyons v. the East India Company*, 1 Moore's P. C. Rep., and gave judgment for the plaintiff, absolving all but the first defendant. The first defendants appealed.

The *Queen's Advocate* (with him *Rust*) for appellants: It appeared from the evidence that plaintiff was in the habit of getting deeds drawn up in the name of his servants, though he, the plaintiff, was the party beneficially interested. The present was an attempt by the plaintiff, admittedly an alien, to set up a right to land, through the interposition of a third party, a proceeding wholly void and illegal as being opposed to the policy of the Law. [MORGAN, J.,—The case here is different. The plaintiff employed the first defendant to see the deed drawn in plaintiff's own favor, but the first defendant practised a fraud upon the plaintiff by taking a transfer for himself. STERLING, C. J.,—I do not think Alien law forms part of the law of this Colony.] I admit that under the Roman Dutch Law, aliens have all the rights and privileges of subjects except admission to public offices,1 Burge *Col. and For. Law*, p. 696, Vander Linden's *Instit.* 66. But the law of aliens is a part of the prerogative law of allegiance, which follow the footsteps of the crown into all its possessions, 1 and 2 Blacks. *Comm.*, Chitty on *Prerog.*, Wheaton's *Internat. Law*, Harrison's *Dig.* tit "Foreigner," Vattel's *Internat. Law* &c. That being so, does the case of *Mayor of Lyons v. The East India Company* make any difference? [MORGAN, J.—If the plaintiff is not entitled to the land, who else is?] The crown. [MORGAN, J.,—But the crown is no party to the suit. We might decree the land to the plaintiff, with out prejudice to the rights of the crown.]

Dias (with him *W. Morgan*, and *Lorenz*) was heard for the respondent on the merits.

The Court held as follows :

The decree of the court below must be amended and the deed in question declared to enure to the benefit of the plaintiff for whom and on whose account the premises it refers to was purchased, and the first defendant condemned to reconvey such premises to the plaintiff at his own expense; the first defendant is further condemned to pay £50 sterling damages and the costs of the plaintiff and the other defendants in the District Court and in appeal.

The Supreme Court concurs with the District Court in the

1860. Feb. 28. — view it takes of the merits, the amendment above directed being merely with a view to form.

It is unnecessary to decide the question as to the right of aliens to hold lands, as the crown asserts no claim to the premises and the plaintiff is undoubtedly entitled to the same as against the defendant.

In view of the fraudulent uature of the first defendant's conduct he is condemned to pay the costs not only of the plaintiff, but of all the other defendants.

28th February.

Present :—MORGAN, J. and LAWSON, J.

D. C. Colombo, No. 21,041. } *Aserappa v. Silva.*

Practice—Ejectment—Nature of decree.

Plaintiff prayed in his libel that he may he declared the owner of certain lands and the defendants may be ejected therefrom, and plaintiff may be put and placed in possession of the same.

The District Judge, after evidence heard, decreed that "plaintiff be declared entitled to, and placed in possession of, the land claimed in the libel," without however adding that defendant be ejected therefrom.

The plaintiff sued out a writ of possession and by virtue thereof the Fiscal directed the plaintiff to take possession of the land in question, but refused to eject the defendant who would not give up possession. Thereupon the plaintiff moved for a rule against the defendant to shew cause why the judgment should not be revived with costs and a fresh writ should not issue to eject the defendant and to put and place the plaintiff in possession of the said lands. The rule was granted, and on a subseqnent day made absolute, but without costs : against which order, disallowing costs, the plaintiff appealed.

On appeal (*Lorenz* for appellant), the order as to costs was set aside, and costs of the rule allowed to the plaintiff, in these terms :—

The judgment declaring petitioner "entitled to, and to be placed in possession of, the land," authorized the ejectment of the defendants therefrom. Uunless such a judgment expressly reserves the defendant's right to pessession, or purports to be made without prejudice to such right,—which is sometimes done in the case of planters or parties entitled to joint possession,—it necessarily involves the ejectment of the defendant ; for the plaintiff cannot be said to be put into possession, (which, unless qualified as above

stated, means absolute, full possession) as against the defendant, if such defendant is allowed to remain in possession also. 1860. Feb. 29.

C. R. Jaffna, No. 24540. — *Fernando v. Nicolan.*

Practice—Claims of preference and concurrence.

Per Curiam:—Claims of preference and concurrence should be decided summarily by the Court which issues the writ of execution under which the claims are made; and parties should not be referred to a new suit, unless they are at issue upon material allegations, which cannot be conveniently tried and determined in the original cause.

29th February.

Present:—Morgan, J. and Lawson, J.

D. C. Kandy, No. 31273. — *Nannytamby v. Assignees of the insolvent estate of F. Hudson & Co.*

Loan to partner—Mortgage by him of partnership property—Power of attorney—Subsequent ratification—Benefit of the firm.

The plaintiff averred in his libel that *Francis Hudson* a partner of the firm of *F. Hudson & Co.* became indebted to the plaintiff upon his bond in the penal sum of £12000, and as security for the same mortgaged certain stock and assigned certain debts belonging and due to his business in Kandy; that the plaintiff upon the bond advanced £ 500 and promised to make further advances, not exceeding £ 6000, and that the said *Hudson* undertook after two months' notice to refund all sums so advanced, and also to pay interest quarterly at 12 o/o; that plaintiff, in terms of the said bond, advanced from time to time the sum of £ 4556. 3. 6. And the plaintiff further alleged that the said *Hudson* delivered over to him the possession of such stock, debts &c., as he had, and did not pay to him, the plaintiff, the whole or any part of the sums advanced as aforesaid. And the plaintiff now complained that the defendants, claiming to be assignees of the insolvent estate of *F. Hudson & Co.* forcibly took possession of the said stock and debts mortgaged and delivered to the plaintiff and disputed plaintiff's right thereto, to his damage of £ 6000. He prayed that the defendants may be adjudged to deliver over to him the said stock and debts, or to pay to him £ 6000 as damages, and that the said stock, debts &c. may be declared specially bound and executable for the same.

1860. Feb. 29. — The defendants (*D'Esterre* and *Willie*) admitted that *Francis Hudson* executed the bond under which the plaintiff claimed, but stated that he, *Hudson*, did not thereby, nor had he any right to, mortgage with plaintiff the stock, debts &c, belonging to the firm of *Hudson* and *Joseph Viscardi*, neither did plaintiff advance for the use of the said firm any sums of money whatsoever, neither had *Hudson* any right to put plaintiff in possession of the stock, debts &c, of the said firm. And the defendants further pleaded that at the time when *Hudson* executed the bond, he was carrying on business in Colombo with one *Wesche*, under the firm of *Hudson and Wesche*, and in Kandy with one *Viscardi*, under the firm of *F. Hudson & Co.* and that both the said firms were notoriously insolvent, which the plaintiff well knew; and that *Francis Hudson*, intending to cheat the creditors of the said firm of *Hudson & Co.*, fraudulently executed the said bond without any consideration, so far as the said firm of *Hudson & Co.* was concerned; and that any sums advanced under the said bond were advanced for the benefit of *Hudson and Wesche*, and that *Hudson* had no right individually to mortgage the stock, debts &c, of the Kandy business, of all which plaintiff had notice. And the defendants further pleaded that *Hudson* and *Viscardi* during their partnership and at the time of their insolvency were jointly entitled to the goods, chattels and debts which were in the stores of, and due to, *F. Hudson & Co.* Also that on the 9th March 1858, the said firm of *F. Hudson & Co.* became indebted to *Nicol, Cargill & Co.* in the sum of £6418, and to other persons in large sums of money and became insolvents; and that a petition was presented at the instance of *Nicol, Cargill & Co.* to the District Court of Kandy for the sequestration of the said estate of *Hudson* and *Viscardi*; that on the 12th March 1858, *Hudson* and *Viscardi* were declared insolvents and the Court sequestered the estate; that under the authority of the Court, the Fiscal of the Central Province entered into possession of the goods, chattels and effects aforesaid, and that subsequently the defendants were duly appointed assignees of the estate and effects of the said insolvents, and the aforesaid goods, chattels and effects of the said firm of F. Hudson & Co. were by the Fiscal peaceably delivered to the said Assignees on the 12th May 1858, which was the forcible possession complained of by the plaintiff. Defendants prayed for judgment in their favour.

A general replication was filed.

The District Judge held that the defendants in their capacity of assignees, were lawfully in possession of the goods chattels and effects of the late firm of *Francis Hudson & Co.* and non-suited plaintiff mainly on the ground that the bond upon which he sued was granted by *Hudson* individually for loans to be made to him,

and not by *Hudson* and *Viscardi* trading together as *Hudson & Co.* or by *Hudson* for himself and as the attorney of *Viscardi.* 1860. Feb. 29.

On appeal preferred by the plaintiff, *Lorenz* (with him *Dias* and *Dunuwille*) appeared for appellant; *Rust* for respondents.

The Court held as follows :—

The principal objection made to the petitioner's case and upon which the judgment of the District Court dismissing it was based, is that the bond, upon which he sues, was granted by *Hudson* individually for loans to be made to him, and not by *Hudson* and *Viscardi*, trading together as *Hudson & Co.*, or by *Hudson* for himself and as the attorney of *Viscardi.* It is clear that both in the body of the instrument and in the signature, *Hudson* is personally referred to; but though such is the case, it is equally clear that the goods pledged by *Hudson*, as security for the debt, on the faith of which credit was given him by the plaintiff, were "all the stock in trade, goods, office furniture, wares and merchan-"dize then being or hereafter to be in his stores in Kandy, posses-"sion whereof he (*Hudson*) with those presents delivered to the "plaintiff; and all accounts and all sums of money whatsoever, "which then were or hereafter might be or become due or owing "to him on account of the said Kandy business." Looking only to the bond, the case presents itself as one in which a partner pledges the property of the firm for his individual debt; and the first question for consideration is this, Is such security operative and valid as against the firm? "It would seem," says Smith in his *Mercantile Law*, p. 41, "that the unexplained fact that a part-"nership security has been received from one of the partners in "discharge of a separate claim against himself is a badge of fraud, "or of such palpable negligence as amounts to fraud, which it is "incumbent on the party who so took the security to remove by "shewing either that the partner from whom he received it acted "under the authority of the rest, or at least that he himself had "reason to believe so." "Although this," says Story in his work on *Partnership*, "is the general doctrine in the absence of all con-"trolling circumstances, yet the presumption of any fraud or mis-"application may be rebutted by the circumstances of the particu-"lar case." Thus it may be shewn "that the other partners have "directly or by fair implication authorized or confirmed the appli-"cation of the partnership funds, securities, effects or credits to the "very purpose; or that the partner had acquired, with the consent "of his partners, an exclusive interest therein, or that, from other "circumstances, the transaction was actually *bona fide* and unex-"ceptionable, although it went to the discharge of the private debt "by one partner only. For it has been very justly remarked that "the application of a single partner of a joint security in discharge

1860. Feb. 29. "of his individual debt by no means necessarily establishes that it "is a fraud upon the firm, for it may not only have been expressly "authorized by the firm, but it may frequently result from pru-"dential considerations and arrangements referrable to their own "business and interests."

It is necessary to consider whether there is any such authority or controlling circumstances in the case.

It is proved in evidence, that at the time *Hudson* executed the bond in question, he held a power of attorney from *Viscardi*, the only other partner of *Viscardi & Co.*, giving him power to "make "any sales, mortgages, leases, assignments of leases, exchanges or "dispositions as should or might be necessary or proper of any "plantations or estates, or other lands, and cattle, stock, crop, pro-"duce or other property, goods and effects whatsoever to or in "which the said firm of *Viscardi & Co.*, or he, the said *J.* "*Viscardi* individually and apart from the said firm in his own "right, should or might be entitled or interested." With reference to the firm of *J. Viscardi & Co.* it may be necessary here to explain that that was a firm which did business in Kandy up to the 12th November, 1857, when it was put an end to by a notice which was published in the local newspapers, and which set out that the business in future would be carried on by another firm then established, in which *Hudson* and *Viscardi* were to be the partners, and which was to be carried on under "the style and firm of *F. Hudson & Co.*," to and by which the said new firm all accounts due to and by the old firm were made payable.

It is clear that this power of attorney authorized *Hudson*, at the time he executed the bond, to pledge all *Viscardi's* right to or interest in the Kandy stock. But it is objected that to bind *Viscardi*, *Hudson* ought to have executed the instrument as an attorney, and that the power given must be held to have been revoked by the dissolution of the firm of *Viscardi & Co.*, published in the notice already referred to.

Both these objections are of a formal character. With reference to the first, this Court cannot, as a Court of Equity, allow an error in description to have weight, if *Hudson* really meant, as he undoubtedly did, to act for his partner and pledge his partner's property, and had substantially the power to do so. *Hudson* himself would not be allowed to take such an objection; nor can his partner do so after giving him the unlimited powers he did, and enabling him to make what dispositions of the property he pleased. It follows, that others acting for such partner, and in his stead and interest, cannot do so either. But pledge of personal property, such as the Kandy stock, need not be made by deed, simple delivery of possession would be sufficient. (Ordinance No. 7 of 1852, cl. 22.) The case is not therefore one in which any deed with formal re-

quisites is necessary. The simple question for inquiry is, had Hudson at the time he pledged *Viscardi's* share and interest, a right to do so? and this the power of attorney, which he held at the time, must decide in the affirmative. 1860. Feb. 29.

If, however, the power of attorney had no operation at the time, the proof of authority would, under this head, be wanting. But the Supreme Court cannot hold that the power was revoked by the dissolution of the firm of *J. Viscardi & Co.* The power was executed by *Viscardi* on the 10th November preparatory to his leaving Ceylon. The notice in question is dated the 12th November; both these acts were obviously in furtherance of the same design, to clothe *Hudson* with free powers to act for *Viscardi,* both as attorney and partner; and it certainly was not intended by the parties that one should supersede or put an end to the other. Nothing but a positive rule of law having such effect, will induce the Court to hold, contrary to the manifest intention of the parties, that the one must operate as a revocation of the other, and there is no such rule.

It must be also recollected that the power given to *Hudson* was with reference to *Viscardi's* property, not only as a member of the firm of *Viscardi & Co.*, but to all which he, *Viscardi,* was entitled to, and interested in, individually, and apart from the said firm.

For these reasons, the Supreme Court holds that the power of attorney shows that *Hudson* had full authority to act for *Viscardi & Co.*, and that the presumption of fraud or misapplication by a partner of partnership security is rebutted.

If *Hudson* was authorised to pledge his partner's property under the power of attorney, it is immaterial to enquire how far a partner can, as such, pledge firm property, and whether such pledge is within or without the scope of their business,—objections which can only apply where there is no express authority, and where a partner acts under the implied authority, which attaches to his character as such.

In addition to the power of attorney, a letter was proved in evidence dated the 21st January, written by *Hudson & Co.* to *Mr. Brown* of Kandy, whom the petitioner had appointed to take charge for him of the goods in Kandy, informing him that they had given plaintiff "a mortgage upon stock and debts together, with fixtures of their store in Kandy," and that *Mr. Merritt* was in possession of the premises for the plaintiff. Here is a proof of ratification by *Hudson & Co.* of what was done by *F. Hudson.* And even where a transaction is *prima facie* fraudulent against a firm, which there is nothing to shew this to have been, yet it will bind them, if they subsequently approve of it. (Smith p. 47; Collyer p. 357; *Ex parte Bonbonus,* 8 Ves. 544.)

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Having considered the evidence in support of the assent and ratification by *Hudson & Co.* of the act of *F. Hudson*, it is necessary further to enquire, whether or not there are other circumstances to rebut the presumption of fraud or misapplication which the act unexplained would give rise to.

In the ordinary case of a partner pledging firm property, he in giving partnership security for a private debt due by him, commits an act for his own exclusive gain, and to the prejudice of his co-partners. But such can hardly be predicated of the state and result of the transaction now in question. *Hudson* and *Viscardi* were partners of the firm of *Hudson & Co.*, trading in Kandy, Gampola, &c. and *Hudson* and *Wesche* at Colombo. *Viscardi* originally purchased the Kandy business from *Hudson* for seven thousand pounds, in payment of which he gave fourteen promissory notes for five hundred pounds each. But two, or at most three, of the notes were paid, the others were afloat at the time. *Viscardi* purposed to leave the Island, when *Hudson*, jointly liable on these notes, which had been made over to *Nicol Cargill & Co.*, became his partner. It is clear that *Hudson* was in very embarrassed circumstances. *Mr. Richmond*, partner of *Nicol Cargill & Co.*, his largest creditors, swears that he was notoriously insolvent, though he does not say the same of *Hudson & Co.* Assistance rendered to *Hudson*, therefore, enured to the benefit of the firm, and it was under these circumstances that *Hudson* pledged the credit of the firm, not for a pre-existing debt incurred by him on his own separate responsibility, but for the purpose of including the plaintiff *thereafter* to make such advances as he (*Hudson*) from time to time would require and call for. These are patent circumstances to rebut the presumption of fraud or misapplication in the partner pledging firm property, and the creditor receiving such pledge. Referring to circumstances not unlike these, Lord Eldon observed in *ex parte Bonbonus* (*8 Ves. 544*), "There is no doubt "now, the law has taken this course: that if under the circumstances, "the party taking the paper can be considered as being advertised "in the nature of the transaction, that it was not intended to be a "partnership proceeding as if it was for an antecedent debt, *prima* "*facie*, it will not bind them; but it will, if you show previous "authority or subsequent approbation, a strong case of subsequent "approbation raising an inference of previous positive authority. "In many cases of partnership and different private concerns, it is "frequently necessary, for the salvation of the partnership, that the "private demand of one partner should be satisfied at the moment; "for the ruin of one partner would spread to the others, who would "rather let him liberate himself by dealing with the firm."

It appears to the Supreme Court that, whilst the power of attorney and letter shew previous assent and subsequent approba-

tion, all the circumstances of the case effectually rebut the presumption of fraud or misapplication, which would be necessary to render the security given by *Hudson* to the plaintiff inoperative as against the firm of *Hudson & Co.* The bond must therefore be upheld for such advances as were *bona fide* made under it. 1860. Feb. 29. —

What were those advances? Going through the account filed with the libel with reference to the evidence, the Supreme Court considers that the items proved are the 1, 4 ,7, 9, 12, 15, 22, 27, 28, 31, and 32nd, amounting in the aggregate to three thousand and thirty pounds, fifteen shillings and nine pence. The 0, 6, 10, 13, 16, and 29 items amounting to sixty one pounds, four shillings and eight pence, represent interest. The 2, 5, 8, 11, 14, 17, 18, 19, 20, 21, 23, and 30, being for commissions and guarantee, do not properly come under the bond and must be disallowed. The 24th item represents a claim of seven hundred and fifty two pounds, fourteen shillings and six pence, being a debt alleged to be due by *Hudson* to *Mr. Brown*, with interest and commission superadded, and which the plaintiff says he undertook to pay. The undertaking, however, is contingent upon the item being allowed the plaintiff as against *Mr. Hudson*, and it appears further that *Mr. Brown* has proved for this very item against the Insolvent Estate. Under these circumstances, this item also is disallowed. Deducting these, the amount to be allowed the plaintiff would be, principal and interest, three thousand and ninety two pounds and five pence.

The greater part of the items are payments due by *Hudson* and *Wesche*, as appears from the face of the documents under which the advances were made by plaintiff, and they have hence been objected to by the defendants. But the plaintiff having been bound by the bond to make such advances as *Hudson* called for, and having obtained possession of the property pledged, to cover such advances, it was not for him to see to their application, nor, when *Hudson* called for any, could he object to make the same, on the ground that it was due on one account and not on the other. Besides it has already been shown that, such was the state of accounts and dealings that every farthing advanced to *Hudson* helped the firm of *Hudson and Co.* And the same observation may be made as respects the Kandy and Colombo firms, the principal work done by them seeming to consist in one drawing bills upon and making notes in favour of the other, by discounting which funds were raised. A large amount of these bills and notes were constantly afloat, and *Mr. Wesche* swears that, on the 20th January, 1858 there was a balance due by *Hudson & Co.* to *Hudson* and *Wesche* of two thousand and sixty pounds, and "that *Mr Hudson* instructed him to consider the amounts advanced by plaintiff as replacement of the amount due by *Hudson and Co.*, but that he himself did not make any entry to this effect, because he

1860. Feb. 29. — kept the account open until the whole amount was paid." On the 12th March, 1858, when *Hudson and Co.* were declared insolvents, the balance of their old-standing accounts with *Hudson* and *Wesche* was one thousand nine hundred and fifty one pounds, nineteen shillings and nine pence in favor of the latter. To this extent, at least, the creditors of *Hudson and Co.* were directly benefited by the advances made by plaintiff, whilst the connection between the two firms with each other, and between *Hudson* and both the firms, was such that advances made on his order, whether to him or to the Colombo firm, indirectly at least benefited the firm in Kandy, whose property was pledged. The ruin of *Hudson* must have spread, as it eventually did, to both firms, and they were interested in upholding his credit.

These observations furnish also an answer to another objection, made by the learned counsel for the defendants, that the transaction was in fraud of *Hudson & Co.*, in respect of which it must be further remembered that there is no evidence to shew that at the time the securities were given *Hudson & Co.* were not solvent. The contrary must be inferred from the evidence of *Mr. Richmond.*

The Supreme Court has all along assumed that plaintiff had possession of the goods pledged to him, and this it has done not only on the evidence of *Mr. Brown* and *Martin Ambrose*, who were called as witnesses by the plaintiff, but on that of *Mr. Gray*, who was called by defendants. The facts established by him that *Mr. Brown* took stock, was always there, kept the keys of the establishment, and that his clerk used to open the store in the mornings and close it in the evenings, are strongly corroborative of the plaintiff's testimony on this head, and indeed sufficient in themselves to shew that *Mr. Brown* had possession. Reference was made at the bar to the criminal case brought against *Mr. Brown*, and in which he was convicted. But all that the Court found in that case was that *Brown* was not justified in forcibly expelling the Fiscal who had taken possession of the store, under the orders of the Court, and was in such possession at the time the force was applied. Whether *Mr. Merritt*, who had ostensible charge of the store at the time, had such charge when the Fiscal entered and took the keys—*Mr. Brown* says, most improperly, stole them—for the insolvents or for the plaintiff, was not then enquired into and determined. The evidence taken in this case shews clearly however that *Merritt* had charge of the store under *Brown*, for the plaintiff.

For the reasons given above, the Supreme Court is of opinion that the pledge must be upheld, to the extent of the advances already referred to, three thousand and ninety-two pounds and five pence, for which plaintiff is entitled judgment. Considering, however that he has claimed much more than he now recovers, and that

under all the circumstances the assignees had fair reason to put the plaintiff to the proof of his case, the costs should be divided. 1860. Feb. 29.

D. C. Kandy, No. 314. *In the matter of the goods and chattels of Juan Appoo, deceased.*

Instruments not purporting to be testamentary—when admitted to probate.

On the question whether the document propounded was a deed of gift or a will, the Supreme Court remanded the case for the District Court to take proof of the document as a Last Will, and to issue administration with the will annexed. It held as follows:—

The true principle to be deduced from the authorities, appears to be, says *Williams*, in his book on *Executors* vol.1, p. 91 (5th Edn.), "that if there is proof, either in the paper itself, or from clear evi-" dence *dehors*, first, that it was the intention of the writer of the " paper to convey the benefits by the instrument which would be " conveyed by it if considered as a Will; secondly, that death was " the event that was to give effect to it; then whatever be its form, " it may be admitted to probate, as testamentary."

The translation upon which the District Court proceeded, contained the words " to be possessed by him *henceforward* for ever as his parveny property," which would indicate that the disposition was to take effect from the time of the execution: but " henceforward" does not appear in the original. It is executed before five witnesses, which is the number required for a last will; and not before a Notary and two witnesses, as is necessary in case of deeds conveying lands. Its being called a hand-note or rather acquittance, and the provision as respects a more perfect instrument, can make no difference. It was held in *Masterman v. Maberly*, 2 Hag. 247, that " if the paper contains a disposition of the property to " be made after death, though it were meant to operate as a " settlement or a deed of gift, or a bond, though such paper " were not intended to be a Will, or other testamentary " instrument but an instrument of a different shape; yet, if it " cannot operate in the latter, it may nevertheless operate in " the former character." The document in question, not being notarial, cannot operate as a deed, and the fact that it was made when the deceased was *in extremis*— for according to the affidavit of death he died on the same day that he signed the paper (22nd July, 1858)—and the reference made in it to his illness, as well as the fact already adverted to—that it is attested by five witnesses—are all indicative of his intention, that the document was to operate as a Will, and to take effect after death.

1860. March. 1. —

1st March.

Present :—MORGAN, J. and LAWSON, J.

C. R. Colombo, No. 37,754. } *Dona Bastiana v. Menchy Hamy.*

Illegal contract—Money lent on a pawn in breach of Ord. No. 17 of 1844, cl. 25. [Ord. No. 16 of 1865. cl. 66.]

The plaintiff in this case claimed £5, being money lent and advanced by her to the defendant, and interest. The defendant denied the plaintiff's claim to £5, but admitted to have borrowed and received only £2, on the pledge of certain articles of the value of £6: which amount the defendant was ready to pay on the plaintiff's returning the goods pledged.

At the trial of the case in the Court below, the plaintiff on examination stated that she lent the defendant £5 on her pledging two gold bangles and one gold chain; that she had no writing or other instrument in support of her claim; that no officer of the Police witnessed the transaction; and that she did not shew the articles pawned to any officer of the police. Hereupon the defendant pleaded the 25th. clause of the Ordinance No. 17 of 1844 in bar of the plaintiff's claim.

The learned Commissioner held as follows:—

"The plaintiff, not having (when she lent the money) received the gold bangles and gold chain by shewing them to the principal officer of her division *(as she was bound to do)*, is by the 25th clause of the Ordinance No. 17 of 1844 declared guilty of an offence, and is therefore, in my opinion, precluded from coming into a Court of Justice and seeking its aid to enforce the performance of a contract which originated on her part in a transgression of the law. The benefit of the public, and not the advantage of the defendant, is what the Court must look to.

" 'The object of all laws is to repress vice and promote the 'welfare of the state and of society, and an individual shall not 'be assisted by the law in enforcing a demand originating in a 'breach or violation on his part of its principles and enactments.' Chitty *on Contr.* p. 657, 3rd ed.

"This is a contract prohibited by statute, which the Court cannot uphold. The 25th clause was enacted clearly for the prevention of frauds, perjuries, and all other attendant evils, and it is for the public good that its intentions should not be allowed to be thwarted.

" 'A contract is void if prohibited by a statute though the 'statute only inflicts a penalty, because such a penalty implies a 'prohibition.' In *Bartlet v. Vinor*, HOLT, C. J. observed, 'Every 'contract made for or about any matter or thing which is prohi'bited and made unlawful by any statute, is a void contract, 'though the statute itself does not mention that it shall be so, but

'only inflicts a penalty on the defaulter; *because a penalty implies* '*a prohibition,* though there are no prohibitory words in the sta- 'tute.' Chitty *on Contr.* p. 695, 3rd ed.

"Under these circumstances, the Court is of opinion that the plaintiff is precluded from recovering the amount claimed. Nor can it make any order in favor of the defendant who also states that no officer of Police was present at the transaction, and that no deed or other instrument was executed in regard thereto.

"Plaintiff is therefore hereby non-suited; each party bearing her own costs."

On appeal by the plaintiff, the Supreme Court held as follows:—

The decree of the Court below is affirmed for the reasons stated by the Commissioner, which appears to the Supreme Court conclusive; and further because it appears that it was the intention of the Legislature to avoid such contracts altogether, and not in part; and that to lend any other construction to the clause in question would enable the pawnee to commit a fraud on the pawnor by retaining the property pledged and recovering the money advanced thereon, although the pawnee is at least as much in fault as the pawnor.

7th March.

Present :—Morgan, J. and Lawson, J.

C. R. Newera Ellia, No. 2,576. } *Fowler v. Baba Appoo.*

Trespass—cattle damage feasant—remote damages.

The Court, in setting aside the decree of the Court below, held as follows:—

The defendant would be liable to pay any damages which were the natural and probable consequence of his allowing his bull to stray on another's land, but not damages, which are the remote or accidental consequences of such act. Injury done to the trees and in plaintiff's estate would be a case illustrative of the former. But the consequence now complained of ("the animal having "bulled an English cow of the plaintiff kept for the purpose of "going to *Mr. Kellow's* English bull, so that the cow brought "forth a calf worth one pound sterling, whereas she would have "brought forth a calf worth six pounds,") is one by far too remote and accidental to form the subject of a claim.

1860. March. 7.

D. C. Colombo, No. 27,514. } *Thompson et al. v. Myloo Pulle et al.*

Provisional judgment—when allowable.

This was an action on a promissory note and on a bond granted by the defendants to plaintiff, who prayed for provisional judgment thereon.

To the note filed of record was attached an entry by the Notary Public as follows:—

I presented the annexed promissory note to S. Myloo Pulle and S. Sanmogam, and demanded payment thereof, when they handed to me the annexed slip of paper, containing their answer, which is as follows:—

"The arrangements upon which this promissory note was given to Messrs. Thompson and Adams not having been carried out as agreed, we decline paying the same."

Colombo, 30th July, 1859. (Signed) { "S. Sanmogam," "S. Myloo Pulle."

On the motion for provisional jugdment being pressed, 2nd plaintiff was examined and admitted that no money passed from himself or Mr. Thompson to the defendants when the note was given; that the note was given in pursuance of an agreement entered into between plaintiffs and some creditors of one Mr. Ponnambalam, an insolvent, whereby the plaintiffs were to quash the insolvency of the said Mr. Ponnambalam. The 2nd plaintiff said: "the giving of the promissory note was one of the reasons for acceding to the quashing of the bankruptcy and for signing the agreement. I suppose the consideration for defendants having signed the note was our signing the agreement. No other consideration was given by plaintiffs. It was our intention and that of the European creditors to oppose Mr. Ponnambalam obtaining his certificate. I am not aware that this intention was communicated to Mr. Ponnambalam or to his friends. It may have come out casually. I have no doubt he and his friends suspected our intention, from our having summoned the female members of his family to give evidence. I believe that it was to avoid publicity which would have taken place if the investigation had gone on, that his friends came forward and offered 10/s. in the £, and that the agreement was entered into &c."

The District Judge held as follows:—

"Two points have been urged by the counsel for defendants against the motion for provisional judgment.

(1.) That the pro. note was given in pursuance of an agreement, a condition precedent whereof has not been fulfiled, viz: the annulling of Mr. Ponnambalam's insolvency, the same not having been legally effected, according to the provisions of the 140th and 141st sections of the Ord. No. 7 of 1853.

(2.) That the note was given for forbearing to oppose the insolvent's certificate, and reference was made to cl. 128 of the Ordinance.

"With regard to the 1st objection, it does not appear from the 2nd plaintiff's examination that the proposed arrangement was not carried out; and further on reference to the insolvency case No. 129, the Court finds that in accordance with a motion to that effect, the adjudication of insolvency was annulled. As to whether that order was legally made, its efficacy, and moreover how far this Court cau regard it as void, are questions which it would be premature to decide on a motion of this nature, the plaintiffs holding on the face of it a valid liquid instrument whereon the provision is claimed.

1860. March. 7.

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"As respects the second objection, I also think that it is not one, for the reason last stated, that should be allowed to defeat the present application. The plaintiff does not acknowledge that the note was given in consideration of forbearance in opposing Mr. Ponnambalam's certificate. And besides it may admit of considerable question if the 128th clause can be held to apply to a composition agreed to by the assignees aud nearly all the creditors, with the cognizance of the ourt."

The District Judge accordingly condemned the defendants to deposit in Court the amount claimed.

On appeal, *Lorenz* for appellants cited *Voet* XLII. i. § 10 and 15, and *Jones v. Barkley*, 2 Dougl. 864. *Rust* for respondents.

The Supreme Court held as follows:—

It appears from the plaintiff's own admission that no money passed at the time the note was given by the defendants, and that the same was given in pursuance of a certain arrangement to supersede and annul the bankruptcy of Mr. Ponnambalam. It appears further that such arrangement was not fully carried out; the order made by the District Court being on the face of it contrary to the provisions of the Insolvent Ordinance. Are the plaintiffs to blame for this? Does the non-supercession of the adjudication furnish sufficient ground to the defendants to avoid their note? Whose business was it to see the arrangement carried out? These are some of the questions which the admissions of the plaintiffs, when examined in Court, and the records referred to, raise for consideration, and they are obviously questions too important to be decided in a summary application made for provisional payment. Where an instrument which forms the basis of an application, like the present, is one which, according to plaintiff's own shewing, is not so complete in itself as to raise a strong presumption in favor of plaintiff's claim (as in the case of bonds, notes, bills for money lent on goods sold, &c.), but is connected with others, and calling for such further enquiry as the instrument now before the Court does, namptissement should not be granted upon it.

1860. April. 11.

11th April.

Present:—Morgan, J. and Lawson, J.

C. R. Balapiti Modere, No. 9,163. } *Umma Haminey v. Edery Baademeya.*

Possessory action—its nature—Practice.

Per Curiam:—Set aside and the case remanded for the plaintiff to amend his plaint by pleading title to the property, when the Court will proceed to try and determine the same. Costs divided.

The suit, as originally brought, was a proprietory one; but in amending the plaint, the clerk entirely altered the nature of the claim aud made it only a possessory one. The possessory action of the Roman Dutch Law lies only where a party who has had possession for more than a year and a day is dispossessed by force; it is a summary remedy, and judgment given in it in no way determines the title to the land, but leaves that an open question. It is clear from the original plaint and the evidence that this is not the form of action which the plaintiff intended to bring, or the nature of the judgment which he sought to recover; and it will save the parties the expense and delay which ulterior proceedings may give rise to, were the plaint amended at once, as is now directed.

Where the plaint filed by parties are in any way defective or unintelligible, it will be better that the Commissioner should examine such parties under the 13th section of the Rules attached to Ordinance No. 9 of 1859, and thus clear up and ascertain the issues to be tried, than that the clerk should be directed to enter an amended plaint.

12th April.

Present:—Morgan, J. and Lawson, J.

D. C. Kandy, No. 30819. } *Pandittesinghe Appoohamy v. Punchy Appoohamy.*

Intervention—Practice.

Upon a motion to intervene, the District Judge allowed the intervention though it was adverse to both parties, on the ground that he had no power to reject it in view of cl. 32, sec. 1 (civil jurisdictiction) of the R. and O.

On appeal by the plaintiff, the Supreme Court set aside the order and remanded the case to the District Court for the intervenient to file his petition of intervention, shewing the interest in the subject matter of the suit. It held,—

The Roman Dutch Law requires a party seeking to intervene

to file his articles of intervention, shewing summarily his interest to justify such intervention. *Gaill's Obs. lib. 1. Obs. 69 et seq.* The practice in Colombo accordingly is, for the intervenient to commence with his petition of intervention, which sets out his interest, and ends with a prayer asking for leave to intervene, and that his petition may be accepted and parties noticed thereon.

1860. April. 20.

Here there is no petition or even a motion shewing the interest of the applicant and the Supreme Court is not in a position to ascertain whether he seeks to intervene in support of either of the litigant parties, or adverse to both, and if the latter, whether the case is one admissible under the Roman Dutch Law,—and the rules of Court must be considered and observed in reference to that law of intervention. When the intervenient in this case files his petition and the District Court gives or refuses him leave to intervene, either party may appeal against the order, when the Supreme Court will be in a position, which it is not now, of giving its views thereon.

20th April.

Present:—Morgan, J. and Lawson, J.

D. C. Kandy, No. 32,402. } *Hammaddoo v. Sultan Saibo.*

Award—irregularity of proceeding—want of reasonable notice of sitting of arbitrator.

This was an appeal against an order of the District Judge discharging a rule *nisi* on the defendant to shew cause why an award given in his favour should not be set aside on the ground of certain irregularities.

The following judgment of the Supreme Court sets out the facts of the case:—

Although an award "when duly made" should be held final as respects the District Court (*Marshall* p. 37), yet it is competent for that Court to enquire and ascertain whether it has been duly made or not. It is open to parties to move to set aside an award for irregularity of proceeding, or other sufficient cause; and such motions have ere this been made in the District Court and sanctioned by the Supreme Court.

Several grounds of irregularity have been urged against the present award; but the one which has had weight with the Supreme Court, is the want of reasonable notice to the plaintiff of the sitting of the arbitrator on the 31st December.

It appears that notice was served on the plaintiff on the 29th December at Matale, to appear with his witnesses before the arbi-

1860. April. 27. — trator at Kandy on the 31st of that month; that the plaintiff wrote to the arbitrator to explain that he could not attend on that day, not being able to get his witnesses up, and being himself obliged to be present at Matale then, as some property of his was advertized to be sold under execution; that on that day the defendant and his witnesses were present, and the plaintiff and his witnesses absent; that the defendant's counsel objecting to a postponement, the arbitrator proceeded to hear the defendant's witnesses; and that after doing so, he, on the 6th January, made his award in favor of the defendant.

It appears to the Supreme Court that "though the precise time at which the arbitrator should summon the parties is discretionary, yet that time should be reasonable," (*1 Stephen p.* 191; *Featherstone v. Cooper, 9 Ves. 67.*); that notice on the 29th served on a person at Matale to appear with his witnesses at Kandy on the 31st, was not reasonable; and that therefore the arbitrator should not have proceeded, on the last named day, to hear the case *ex parte*. Under these circumstances, the award founded upon the *ex parte* hearing cannot be upheld.

C. R. Jaffna, No. 25,491 } *Valliamme* v. *Valen.*

Jurisdiction—alimony. The Supreme Court set aside the judgment of the Court below and absolved the defendant from the instance in these terms:—

The Supreme Court considers that the Court of Requests has no jurisdiction in cases of alimony. A court which can only award ten pounds in the whole, cannot decree A to pay to B ten shillings and six pence every month for life. The plaintiff should sue her husband in the District Court for separation on the ground of malicious desertion: that Court will be in a position to give her alimony, *pendente lite*, and separation from bed, board, cohabitation and goods.

27th April

Present:—Morgan, J. and Lawson, J.

P. C. Matara, No. 27,115 } *Silva* v. *Towey.*

Gambling—Ord. No. 4 of 1841, cl. 19—"use." *Per Curiam*:—Affirmed as respects the first accused, but set aside as respects the rest, who are acquitted.

It is clear from the evidence that the first accused is the person, "who keeps the place, and that he insists upon get-

ting a share from the winner as soon as one wins, and that he has an interest in the garden. The others only come and gamble there." 1860. 4. May.

Such being the case, it appears to the Supreme Court that the first accused is the only one who comes under the description of "person who keep, hold occupy or use any house or other place, open or enclosed, for the purpose of common or promiscuous gambling." The case of keepers of taverns, shops, places for the retail of spirits or other liquors, houses and other places, open or enclosed, is provided for in the 16th, 17th and 19th clauses as contradistinguished from the case of persons who game, play or bet in the abovementioned places, which is provided for in the 4th clause, 4th section. The single word "use" may at first seem to cover the case of any person who resorts to the place for gambling; but it is clear from the explanation afforded in the 20th clause, that the word refers, not to a person who resorts to a place to gamble, but to the master or manager of the place, as distinct from the owner, keeper or occupier thereof.

4th May.

Present:—MORGAN, J. and LAWSON, J.

D. C. Jaffna, No. 10,336. } *Sedowa v. Casedew et al.*

In this case the Supreme Court held as follows:—

Practice—Judgment by default.

In all cases where a party in default is allowed fresh time to plead, if it is intended that in default of such pleading being filed within the time allowed by the Court, judgment should be entered for the opposite party without further notice to the party in default, such condition should be expressly set out in the order allowing time to plead, in order that due notice may be given of the consequence of any further neglect.

7th May.

Present:—MORGAN, J. and LAWSON J.

D. C. Colombo, No. 27,010. } *Wilson v. The Ceylon Railway Company.*

This action was brought by the Master of the barque "Wood Action for

1860. May, 7. — demurrage—implied promise—Evidence—unstamped written agreement.

bine" against the Ceylon Railway Company for the recovery of £ 50, mainly for demurrage or detention of his vessel during the unloading of the goods. Under the bill of lading, the defendants, as consignees, had undertaken to clear the goods at the ship's hold "at their own risk and expense, the Captain to give the use of the derrick and cordage on board, and the use of the crew in assisting to discharge it, as per agreement, 11th April, 1859."

The defendants pleaded that they never agreed to discharge the vessel within any specified time, and if there was any detention, it was not attributable to any negligence on the part of the defendants, but to the plaintiff's own carelessness in not rendering the assistance he had stipulated to give to the defendants.

The District Judge found on the merits for plaintiff, and held he was entitled to four days demurrage @ £ 5 per day, but the District Judge also held that plaintiff, as master, could not sue for demurrage on an *implied* promise, the written agreement of the 11th April 1859, referred to in the bill of lading, not having been produced. Plaintiff was accordingly nonsuited.

On appeal, *Rust* for appellant, *Lorenz* for respondent.

The Court held as follows:—

This is an action brought by the master of a ship against the consignees of certain machinery for breach of a contract to discharge the said machinery within reasonable time after the arrival of the ship in Colombo.

The master signed bills of lading in the usual form but containing a marginal note in the following terms—"The machi-"nery to be taken out of the ship at consignees' risk and expense; "the Captain to give the use of the derrick and cordage on board "and the use of his crew in assisting to discharge it, as per "agreement 11th April 1859." The goods were received on board by the agent of defendants who proceeded to discharge them, and it is argued for the plaintiff that there is an implied contract on the part of the defendants to unload with due diligence arising from their acceptance of the goods under the terms of the bill of lading—but it appears from the above extract that there was a written agreement which has not been produced nor its non-production accounted for.

There being therefore a written agreement between the parties, and in the absence of the written agreement, the Supreme Court has no evidence of any contract whatever. It has been stated by the counsel for the plaintiff that the agreement was not produced because it was unstamped, but this will not excuse the non-production. See *Turner v. Power* 7 B & C 625, *Buxton v. Cornish* 12 M & W 426.

The written agreement may for anything that appears to the

contrary contain explicit directions as to the time to be allowed for unloading and the amount to be paid for demurrage. 1860. May, 18.

Upon this ground the judgment of the Court below is affirmed, without entering into the consideration of the other questions raised at the trial.

18th May.

Present:—MORGAN, J. and LAWSON, J.

D. C. Kurunegala, No. 14,015, } *Keri Menica, v. Palleme Appoohamy.*

Mesne profits and costs under £ 10—arrest against person—Ord. No. 7 of 1853, cl.164.

Per Curiam:—Affirmed. The sum which the defendant was decreed to pay in this case was two pounds, being the mesne profits received by him, and costs, which amount to two pounds, six shillings and three pence. It appears to the Supreme Court that these items, fall within the description of debt contracted under the 164th. clause of the Ordinance No. 7 of 1853, which disallows arrests against the person for sums under ten pounds. The mesne profits awarded by the Court are so much money had and received by the defendant from the produce of land which was found to belong to the plaintiff, and as to costs, it is clear from the provision at the end of the clause that the ten pounds was to be recovered exclusive of interest "*and of costs,*" and that the Legislature meant to include costs under the general description of "debt contracted."

D. C. Kandy, No. 26,799. } *Punchi Menika v. Kiri Banda.*

Deceiving the Court—contempt—procedure.

The defendant in this case was fined, under cl. 29, sec. 1 Civ. Juris. R. & O., for deceiving the Court.

On appeal, the Supreme Court held as follows:—

Although the 19th clause of section 2 of the Rules and Orders, Criminal Jurisdiction, is repealed, yet it is essential in view of the principles of justice, that a man should be heard before he is condemned. When the Judge found that the defendant had made a false statement, he ought to have distinctly charged him with it, pointing out to him in what the falsity consisted. This mode of proceeding, necessary in every case, was particularly necessary in the present instance, where the statement for which the defendant was punished was made five years before he was punished for it, and before another Judge. The defendant was not, however, charged with having made a false statement, and was not given

1860. May, 18. —

an opportunity of explaining it or defending himself. It appears from the record that the Judge, immediately after he decreed the lands to plaintiff, proceeded to impose the fine on defendant. With every inclination to uphold the authority of the District Court, the Supreme Court cannot sanction the present proceedings.

C. R. Galle, No. 20,002. } *Ahamedo Bawa v. Forbes.*

Quartering of of Police Force—Statutes charging a burden on the subject—Voluntary payment to public officer.

Per Curiam:—Set aside and defendant (the Government Agent of Galle) decreed to pay to plaintiff the sum of 4*s* 10½*d.* with costs.

The Proclamation of 7th August, 1848, in establishing the limits of the Police Force for the town of Galle, sets out that they shall include "all that space of ground which lies to *the south of,* "*and adjoins to,* the cross road leading from the main road to Co-"lombo over the Naaconda Bridge along the side of the canal "through the village of Kandawatte across the Wakwalla Road "through Poconswatte and Gallindewatte, and from thence to its, "junction with the Matara Road." The house of the plaintiff, though it adjoins the cross road above referred to, lies to the *north* thereof; it does *not* therefore come within the limits which only take in all the property to the *south* of the road. It has been contended that as the house *adjoins* the road, and is equally protected by the Police, it falls within the terms of the Proclamation. It is clear, however, that the words cover only the houses on the south of the road, and "it is a well settled rule of law that every "charge upon the subject must be imposed by clear and unambi-"guous language," and even where there is an ambiguity found, the construction must be in favor of the public; because where the public are to be charged with a burden, the intention of the legislature to impose that burden must be explicitly and distinctly shown. *Dwarris on Statutes,* p. 749.

The second point urged by the Crown was that the money having been voluntarily paid could not be recovered back. Money voluntarily paid by a party who is under no mistake cannot ordinarily be recovered hack; but there is a distinction between the case of money paid upon a claim made by a public officer who has the power of summarily enforcing his claim without reference to the ordinary legal remedies, and money paid under a claim by a private individual who has no power of enforcing it except by adopting those remedies. In the former case, it is obviously *contra æquum et bonum,* that the public officer should retain what he has thus acquired, by taking an undue advantage of his situation;

in the latter case, the claimant may have been impressed with a fair belief of his own right, and, (if the party making the payment was not deceived,) then his retainer of the money, when paid, is no more *contra æquum* than his claim of it on the first instance. See notes to Smith's Leading Cases, *Marriott v. Hampton*, vol. 2 p. 339. (Ed. 1856.)

1860. May. 30.

D. C. Galle, No. 18, 838. } *Baban v. Abeyewardene.*

Contract to retail arrack—interest in land—Ord. No. 7 of 1840. cl. 2.

Per Curiam:—A Contract by which a renter sells to a person the right to retail arrack in any tavern is not one which comes within the Ordinance No. 7 of 1840 cl. 2. Such a contract conveys no interest in land. The fact that the retailer is bound by the Arrack Ordinance to retail spirits within certain territoiial limits only, makes no difference: his interest in the locality in which the tavern is held must be, and is in fact, derived from a contract distinct from that which he enters into with the renter. It is not necessary, nor is it always the case, that the renter is the owner of the premises.

30th May.

Present:—Lawson, J. and Morgan, J.

D. C. Colombo, No. 19,758. } *Senewiratne v. Jayewardane.*

Postponement of case—expenses of witness.

On the 8th February, defendant moved for and obtained, on payment of costs, a postponement of the trial of this case which had been fixed for the 19th of the same month. The costs of the postponement, as taxed by the Secretary, included an item of £ 37, being batta and expenses of 15 witnesses. This item was objected to on behalf of defendant, on the ground that plaintiff and his proctor had timely notice of the postponement, and that several of plaintiff's witnesses also had been noticed not to attend court on the 21st February.

The District Judge allowed the taxation, "as the witnesses refused to attend in pursuance of the subpœnas."

Defendant appealed. *Rust* and *Lorenz* for appellant, *Dias* for respondent.

The Supreme Court set aside the order of the Court below and disallowed the item objected to, so far as it included the charges of the witnesses who received notice of the postponement of the trial; and the Court held:—

1860. May. 30. — The appellant would be bound to pay all charges fairly and honestly incurred by the plaintiff in consequence of the postponement. But the expenses of witnesses, whose attendance could have been prevented do not fall under this class.

It was contended in appeal that the motion for postponement should not have been made without notice to the plaintiff, and that the notices of the postponement should have beeu sent through the Court. Such a course would certainly have been better, judging from the result. But the motion for the postponement having been granted, and the Proctor for plaintiff having received due notice thereof, he was bound to apprise his client of such postponement, and the Court must presume that he did his duty. No steps having been taken to set that order aside, the plaintiff must have known that the trial would not come on, and was bound therefore to see that all unnecessary expenses were avoided. The witnesses had written notices served upon them at the instance of the defendant, that the trial would not come on on the 21st. It is clear from Mr. Navaratne's letter that the plaintiff wished him to come to Colombo in spite of the notice served upon Mr. Navaratne that the case was postponded. It does not appear whether he instructed his other witnesses also to do so, but seeing that notices of the postponement were served upon them on the 11th, at or near Chilaw, of which place the plaintiff is the Modliar, the Supreme Court believes that he might with ease have prevented his witnesses from attending, and that he was bound to do so. The expenses therefore of their attendance was unnecessarily and improperly incurred, and to allow such expenses would be to sanction a line of proceeding in the District Court, which this Court is most anxious to discountenance and put an end to.

It will be open to the witnesses, all excepting Mr. Crespen, to apply to have the bills taxed as against the plaintiff. The Supreme Court excepts Mr. Crespyn, the Secretary of the Chilaw Court, who from his position must have known, when he received Mr. Maartensz's notice that the case was not coming on, and who might easily have ascertained the fact had he doubted it by writing to the Secretary at Colombo. If under these circumstances he chose to leave his duties and come to Colombo, he must personally bear the expenses of his visit.

D. C. Colombo, No. 26952. } *Sabapadia Pulle v. Pitche Neyna.*

Appeal—interest of appellant—Writ of

This was an action by the consignee of certain goods against the owner of two vessels, called *the Royal Victoria* and the *Karti Keyan,* and their respective masters.

1860. May. 30. — sequestration —practice— R. & O., cl 15 sec i.

The plaintiff averred that the first defendant, as *tyndal*, and the 2nd defendant, as owner, of *the Royal Victoria*, received on board of her a certain quantity of rice, which they undertook safely and securely to convey from the port of Tranquebar and to deliver the same to the plaintiff at Colombo; that they agreed that they would not delay the said vessel or tranship the said goods from the said brig, *the Royal Victoria*, to any other vessel; that in breach of this agreement, the 1st and 2nd defendants, without proceeding direct to the port of Colombo, sailed to other ports and delayed the goods on board of the said vessel, and, afterwards, unknown to the plaintiff, unloaded the said goods from the said brig and shipped the same on board of the vessel called the *Karte Keyan*, also the property of the second defendant, of which the 3rd defendant was the *tyndal*; that the said brig *Karti Keyan* arrived at Colombo, but the 3rd defendant, though knowing the goods to belong to plaintiff and though requested by plaintiff to deliver the said goods, refused to do so, to plaintiff's damage of £68.

Plaintiff prayed for the value of the rice shipped and the damage sustained.

Simultaneously with the filing of the libel, plaintiff moved for and obtained a sequestration of the vessel *Karti Keyan* (then riding at anchor at the harbour of Colombo) and of the rice referred to in the libel.

The 3rd defendant duly filed answer but the 1st and 2nd defendant did not, being reported not to be found in the District.

Thereupon the plaintiff moved for a writ of sequestration against the property of the 1st and 2nd defendants, in terms of cl. 15 of R. & O. sec. 1. The District Judge on the 3rd of April allowed the sequestration.

The 3rd defendant appealed against this order. *Rust* appeared for him, and *Dias* for plaintiff and respondents.

The Supreme Court held as follows:—

A preliminary objection was made by the plaintiff to the right of the 3rd defendant to appeal against an order affecting the 1st and 2nd defendants only. But the Supreme Court considers that the defendant being a party to the suit, and being further as *tyndal* of the vessel bound to maintain the interests of the owner thereof, it is open to him to appeal and to appear in this Court in support of his appeal.

His counsel has urged two objections to the order of the District Court: 1st that a second sequestration should not have been allowed, and 2nd that the District Court has no jurisdiction as respects the first amd second defendants.

The plaintiff applied for and obtained a writ of sequestration, simultaneously with the filing of his libel, and in pursuance thereof, he seized the rice, which he claimed as his, and the vessel

1860. June. 1. — to cover damages, to the amount of ninety pounds. This, in the opinion of the Supreme Court, is all the security to which the plaintiff is entitled in this action. Having obtained such security, he applied for another sequestration under the 15th clause of the Rules and Orders sec. 1, against the property of the first and second defendants, they being reported not to be found within the District, which the Court allowed. This is the sequestration now complained against. It appears to the Supreme Court that a writ of sequestration having been once allowed against all the defendants, and the plaintiff having obtained thereunder all the security he was entitled to in this case, a second writ should not have issued. The rules provide for the ordinary case where a party commences by summons and enables him to arrest the property of a defendant, who is out of the jurisdiction of the Court. But the ordinary proceeding having been departed from, and a sequestration issued in the first instance, the party has all the protection that he needs, and cannot be allowed to harass his opponent by a double sequestration. To enable the plaintiff to proceed against the second and third defendants (there being of course no other objection to his doing so,) the first sequestration will answer all the purposes of the Rules.

This view of the case renders it unnecessary that this Court should consider the second objection urged by the learned counsel as to the want of jurisdiction.

1st June.

Present :—STERLING, A. C. J., and MORGAN, J.

D. C. Galle No. 1295 } *In the matter of Lebbe Marcar, a minor.* (*Lebbe Marcar v. Abdul Cader*)

Guardian and ward—monies belonging to the ward, how to be dealt with.

Per Curiam : Set aside and the case remanded to the Court below to call upon the guardian to deposit in court the sum of money belonging to the minor, or to give sufficient security therefor and also to deposit the transfer of the landed property belonging to such minor.

The Supreme Court observes with regret the loose nature of the proceedings adopted in this case, and the want of due attention to the interests of the minors, which interests it is the first duty of the Court, as the proper guardian of all minors, to protect and uphold.

The guardian should not have been allowed to receive so large a sum of money, without giving security of immoveable property. The correct course is doubtless to insist upon all

monies being paid to the Loan Board, which has succeeded to the functions of the Weiskamer ; but where the sum of money is small, and the interest derivable from the Loan Board insufficient for the maintenance of the minor, the Courts may, in extreme cases, allow money to remain with the guardian, always taking however from that guardian undoubted security, which in this country should be nothing less than the security of immoveable property. Personal security seems only to have been taken in the present instance, and the securities have not even gone through the ordinary form of swearing to their worth. The certificates of the Head Moorman may be good as auxiliary evidence to satisfy the Judge, but is insufficient in itself without the other cautions which the law requires. 1860. June. 1.

So many instances have come to the notice of the Supreme Court of the manner in which the interests of minors are sacrificed in this country, that it gladly takes advantage of the opportunity afforded by this case, to call the earnest attention of the District Court to the necessity of seeing that, in all cases where guardians have the money of minors, such money should be brought into Court to be deposited into the Loan Board, or real security taken therefor as already pointed out. The direction given in the concluding paragraph of the 4th clause of section 4 of the Rules and Orders, if complied with, will enable the Court to see in what cases it should interfere in requiring proper accounts and securities.

P. C. Jaffna No. 27760. } *Sangerapulle v. Ramen.*

Trespass

The Supreme Court held as follows :—

This case is remanded for further evidence, as it does not appear whether the act was found to be malicious, nor very clearly whether the embankment was on defendant's own land. The annexed cases will guide the Magistrate as to the law ruling the cases, and afford directions in considering whether the case is not of a civil nature.

2 Rolle's Abridgement, *Trespass,* (I) par. 1.

But *semble* that a man who has land next adjoining my land cannot dig his land so near mine, that my land shall go into his pit ; and therefore if the action had been brought for that, it would lie.

Lord Tenterden's judgment in *Wyatt* v. *Harrison,* 3 B. and Ad. 876,—

It may be true that if my land adjoins that of another, and I have not by building increased the weight of my soil, and my neighbour digs in his land so as to occasion mine

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June 8.

to fall in, he may be liable to an action. But if I have that he is to be deprived of the right of digging his own laid an additional weight upon my land, it does not follow ground, because mine will become incapable of supporting the artificial weight which I have laid upon it. And this is consistent with 2 Rolle's Abridgement, *Trespass*, (I) par. 1.

5th June.

Present:—Sterling, A. C. J. and Morgan, J.

C. R. Galle No. 16645. } *Guruway* v. *Bastian*

Fishery—*maadel*—custom.

The Supreme Court set aside the decree of the Court below and entered up judgment for the plaintiff for the sum of £ 3 with costs, in these terms:—

It is clear from the evidence that a person going out in a small canoe to fish is entitled to continue that fishing until the *maadel* is being brought ashore. It is necessary for him to move off only to permit the *maadel* to proceed to shore. Such a custom is reasonable inasmuch as it secures to both people fishing in canoes and those engaged fishing with *maadels*, the benefit of their labours, and does not permit the one to interfere with the other more than is absolutely and indispensably necessary.

According to the evidence, the plaintiff had the pre-occupancy, and the defendant coming with his *maadel* ordered him away from the place, and by a demonstration of force procured his (the plaintiffs') compliance with that order. This defendant did, not when the *maadel* was being brought ashore, but immediately after he first threw in the *maadel*. The plaintiff lost therefore the benefit of fishing on that day to which by pre-occupancy, and by the operation of the custom already referred to, he was clearly entitled.

8th June.

Present:—Sterling, A. C. J. and Morgan, J.

C. R. Kalutara No. 12546. } *Fernando* v. *Manzoni.*

Payment under protest—peculiar relation.

The Court, in affirming the judgment appealed against, held as follows :—

It was contended in appeal that the party paying the money, having been under no mistake in fact or law, he must be held to

1860 June, 11.

have voluntarily paid the same and cannot be allowed to recover it back. But the Supreme Court cannot lose sight of the peculiar relation which existed between the parties, which enabled the one, a priest, to take advantage of the confidence which that relation inspired, and, by undue influence, to obtain money from the other, a member of his congregation. A Court of Equity is ever ready to afford relief under those circumstances. The money paid by the plaintiff was not money which could be legally demanded from him or his brother-in-law; but in a moment of trial and distress, he was worked upon by a threat of having his sister buried without the cross and banner, and the performance of burial service, (he having been taught to regard a burial without them as a disgrace) and thus made to pay the money. He did so under protest and must be allowed to recover it back.

11th June.

Present:—STERLING, A. C. J., and MORGAN. J.

D. C. Colombo, No. 24345. } *Ponamma* et al. *v.* *Tamby Chetty* et at.

Action for tortious legal proceedings,—want of malice—*damnum absque injuria*—Costs.

Plaintiffs' claim was set aside in these terms by the Supreme Court:—

The plaintiffs, as executors of *Ramaya*, complain that the defendants claimed a certain land, which was seized in execution to satisfy a judgment obtained by certain parties against the Estate of *Ramaya*, and brought an action to substantiate this claim, but which action was dismissed; that owing to such claim and action, and the delay which they gave rise to in satisfying the debt due by the estate, the plaintiffs, as executors aforesaid, sustained damages to the amount of £600, which they seek to recover from the defendants. The Court gave plaintiffs judgment for £300-4-6, being the difference between additional interest which they had to pay the holders of the writ against the estate, and the rents and profits received from the gardens. Against which judgment the defendants appeal.

It appears to the Supreme Court that no malicious or corrupt motive in making claim or prosecuting the action being alleged or proved against the defendant, they are not liable in damages. The case is one falling within the principle of *Davies* v. *Jenkins*, 11 M. & W. 745, in which it was held that though the act complained against was productive of inconvenience, and even positive loss to the plaintiff yet it is *damnum absque injuria*, for which no action would lie. The principle of the action is well stated by Mr. Broom in

1860. June 11. — his *Commentaries on the Common Law* p. 80. "In the second of "the three instances above put, that viz. of an action brought un-"successfully, but which nevertheless causes inconvenience and "anxiety of mind, nay even positive loss to a defendant, the reason "why redress and pecuniary compensation for the inconvenience "so caused cannot (at all events in the absence of any malicious "or corrupt motive) be enforced, would seem to be, that our "courts of justice are open to all suitors, who there seek to pro-"secute their claims in the manner prescribed by law ; and that "anything having a tendency to stifle or prevent such inquiring, "*ex gr.* the fear of being mulcted in heavy costs beyond that com-"paratively reasonable amount ascertained by taxation, according "to the scale allowed by law, would be highly inexpedient.

Inasmuch, however, as this objection was not taken in the pleading, or at the trial, and the same might have beem taken at the outset by general demurrer, the costs are divided.

D. C. Galle No. 17,600. } *Issa* et al. *v.* *Wattoo* et al.

Costs of Intervenients.

The Court held as follows :—

It appears to the Supreme Court that the judgment nonsuiting plaintiffs with costs, subjects the plaintiffs to pay the costs of the defendants, who have been brought into court by the plaintiffs, and does not include the costs of the Intervenients who come into Court of their own accord and are not entitled to costs, unless for some good reasons moving the court, when such costs are expressly awarded to them. The orders of the 22nd November and 2nd December 1859 are set aside and costs therein referred are hereby ordered to be paid back to the plaintiffs. Costs in appeal divided.

15th June.

Present:—Creasy, C. J., and Sterling J. and Morgan, J.

The hon'ble Sir Edward Shepherd Creasy Kt. produces in court a warrant under the Hand and Colonial Seal of His Excellen cy Sir Henry George Ward, appointing him Chief Justice of the Island of Ceylon, and takes the usual oaths of office and allegiance.

23rd June 1860. June 23.

D. C. Kandy, No. 26656. } *Lindsay* et al *v. Oriental Bank Corporation* et al.

This case will be found reported in i Lorenz pp. 31—90. The plaintiffs had obtained judgment in the District Court of Kandy on the 16th April 1855, which however was reversed in appeal by the Supreme Court on the 8th of March 1856. Against this judgment, dismissing the libel with costs, plaintiffs appealed to Her Majesty in Council.

The following is the judgment of the Lords of the Judicial Committee of the Privy Council, delivered on the 23rd June. It sets out the facts of the case fully.

Present.

The Right Hon. Lord Kingsdown
The Right Hon. the Lord Justice Knight Bruce
The Right Hon. the Lord Justice Turner
The Right Hon. Sir John Taylor Coleridge
The Right Hon. Sir Lawrence Peel.

In an action to recover possession of real estate in the District of *Kandy*, in the Island of *Ceylon*, by English parties, whose rights were founded upon instruments made in the English form:—Held, (there being no particular law in that District), that the principles of English law were to govern the rights of the parties in the action.

The Roman-Dutch law prevails

This appeal arises out of a suit instituted by the appellants in the District Court of *Kandy*, in the Island of *Ceylon*, against the Oriental Bank Corporation, *George Smyttan Duff*, personally and as executor of *Alexander Brown*, deceased, *James Ingleton*, and *David Baird Lindsay*, for the purpose, according to the prayer of the libel in the suit, of having it declared and decreed that an instrument of the 11th of July, 1848, and a warrant of attorney of that date, mentioned in the libel, were and are, so far as regards the rights of the plaintiffs (the appellants) and the estate of *Martin Lindsay*, deceased, wholly null and void, and insufficient to convey or pass any interest in the said estate, or to create any charge or incumbrance thereon; and of having it also declared and decreed that the rights of the plaintiffs (the appellants), and of the estate of *Martin Lindsay*, were not and are not in any way affected by any proceeding in a suit against the defendant, *David Baird Lindsay*, No. 8,997, mentioned in the libel; and that by no proceeding had in the suit in respect of the execution against the effects of *David Baird Lindsay*, and the sale thereupon of the *Rajawelle* estate, lands and premises, could the estate, lands and premises be legally passed; and that the same did not by any such proceeding become the lawful property of the Oriental Bank mentioned in the libel, or of any of the defendants; and for the further purpose, according to the prayer of the libel, that the defendants might be ejected from the estate, lands and premises, and that the plaintiffs (the appellants) might be restored to their

1860. June 23. — generally in the Island of *Ceylon*. According to the law in force in *Ceylon*, it is essential to the validity of a deed, affecting immovable property, that the deed should be executed in the Island. (See Moore's P. C. Rep. Vol. 13, p. 401.)

original rights, and put and placed in the possession of the estate, lands and premises, on behalf of themselves and those minors and others whose interests they represented, of which possession they had, as alleged, been illegally and fraudulently deprived; and that the defendants might be decreed to pay to the plaintiffs (the appellants), as and for mesne profits, the sum of £10,000 sterling, with costs of suit.

Upon the hearing of this suit, the District Court of *Kandy* on the 16th April, 1855, made the following decree: That the defendants be ejected from the premises in dispute; that the plaintiffs (the appellants), as devisees in trust of the estate of *Martin Lindsay*, be restored to and quieted in possession thereof; that they recover from the defendants mesne profits to the amount of £6,457. 3*s*. 1*d*. sterling, in the following proportions, that is to say, from the defendant, *George Smyttan Duff*, from the 10th of February, 1849, to the 30th of April, 1850; and from the defendant, *George Smyttan Duff*, as executor of the estate of *Alexander Brown*, and from the defendant, *James Ingleton*, from the 1st of May, 1850, to the 21st of May, 1853, at the rate of £1,500 per annum; and that the above defendants do pay the costs of the suit, except the costs of the Oriental Bank Corporation, as against whom the libel was dismissed with costs, and except the costs of the defendant, *David Baird Lindsay*, which were to be borne by himself.

From this decree of the District Court of *Kandy*, the defendant, *George Smyttan Duff*, in his own right, and as executor of *Alexander Brown*, and the defendant, *James Ingleton*, appealed to the Supreme Court of the Island of *Ceylon;* and that Court, by its decree, dated the 8th of March, 1856, reversed the judgment of the District Court, and dismissed the libel with costs.

The appeal before us is brought by the plaintiffs (the appellants) from this latter decree.

Martin Lindsay, the testator, to whom the estate in question belonged, and who appears to have been domiciled in *Scotland*, by his Will dated the 21st of December, 1844, after directing payment of his debts and funeral and testamentary expenses, gave, devised, and bequeathed his undivided share of the *Rajawelle* estate in the Island of *Ceylon*, with the fixtures, implements and utensils thereto belonging, which he held jointly with the heirs of the late *George Turnour*, and all other messuages, lands, tenements, and hereditaments, and other property, whether real or personal, or mixed, belonging to him in the Island of *Ceylon*, unto and to the use of his wife, the appellant, *Elsy Lindsay;* his son, the respondent, *David Baird Lindsay;* his brother the Rev. *Henry Lindsay;* his brother-in-law, *James Hadden*, and his son-in-law, the appellant, *James Farquhar Hadden*, their heirs, executors and administrators,

upon trust, to manage and cultivate the same as they should think most beneficial for the persons who should be entitled thereto under his Will ; with very full and extensive powers of management, and with a declaration of his most earnest desire that his trustees should continue to manage the same as long as might be practicable, without bringing the same to a sale ; and after declaring trusts of the nett proceeds to be derived from the estate and premises for the benefit of his wife and children, he provided that any one or more of his sons who might feel disposed to take the management of the estate and premises, and for that purpose to reside in *Ceylon*, should be at liberty to do so if his trustees should consider the same advantageous, but not otherwise ; and he declared that the son or sons so for the time being acting in the management of the estate and premises should be considered as the agent-or agents, and be subject to the control and direction of his trust tees in the management thereof and othewise relating thereto. He then gave power to his trustees to sell the estate and premises, or any part thereof ; and gave, devised and bequeathed all his real and personal estates, property and effects not before disposed of, and not being real or heritable property in *Scotland*, to which he should be entitled at the time of his decease, unto and to the use of the same trustees, upon trust to convert the same into money, and invest the proceeds thereof, and to stand possessed of the invested fund upon trusts for the benefit of his wife and children ; and he appointed his wife, and *David Baird Lindsay*, *Henry Lindsay*, *James Hadden*, and *James Farquhar Hadden*, to be his executors.

In the month of April, 1846, after the date of his Will, the Testator made some arrangements with the heirs of *Turnour*, under which he became solely entitled to the greater part of the *Rajawelle* estate, and he mortgaged the part of the estate to which he had thus become entitled, and which seems to have retained the name of the *Rajawelle* estate, to *Henry Alexander Atcheson*, the executor of *George Turnour*.

In the month of January, 1847, the Testator died, leaving several children ; and at that time the sum of £4,000 was due upon *Atcheson's* mortgage, and the estate, it appears, was also in mortgage to other persons.

In the month of *April*, 1847, the appellants and *James Hadden* (who afterwards died in the year 1848) proved the Testator's Will in *Scotland*, and in the month of July, 1847, it was also proved in *Ceylon* by *David Baird Lindsay*. It is stated in one of the deeds to which we shall have occasion to refer, that the Will was thus proved by *David Baird Lindsay* under a power of attorney from the other executors and trustees ; but this fact does not appear to have been proved in the cause as against the respon-

1860. June 23. — dents. *Henry Lindsay* did not prove the Will or accept any of the trusts created by it.

Soon after the death of the Testator, the £4,000 secured by *Atcheson's* mortgage was required to be paid ; and thereupon *David Baird Lindsay*, who was the eldest son of the Testator and resided in *Ceylon*, and had the management of the estate there, came over to this country for the purpose of making arrangements to provide for the payment of the mortgage, and for securing the means of keeping up the cultivation of the estate. These purposes were effected by an agreement which was come to about the end of the year 1847, by all the trustees of the Will, including *David Baird Lindsay*, with Mr. *Caffary*, a merchant carrying on business in *London* under the firm of "*Shaw & Caffary*," and which agreement was embodied in a deed made between the appellants and *David Baird Lindsay*, and *James Hadden* of the one part, and *Caffary* of the other part. By this deed, after reciting the Testator's Will, and that the trusts of the Will had been accepted by the executors and executrix, except *Henry Lindsay*, and that the Will had been proved by *David Baird Lindsay* under a power of attorney from the acting executors and trustees, and that *David Baird Lindsay* had, with the concurrence of the trustees, taken upon himself the management of the *Rajawelle* estate, it was agreed that *Caffary* should forthwith pay £2,000, to the trustees, and should forthwith give *David Baird Lindsay* a letter of credit authorizing him to draw bills at six months' sight to the extent of £4,000, to be applied towards paying the mortgage-debt and interest, that the trustees should procure the securities for the same to be transferred to *Caffary*, and should, on *Caffary's* request, execute to him a legal mortgage for the full amount which should have been advanced by him, and for all further advances and supplies which should have been made and furnished by him, and should do all necessary acts for rendering the mortgage effectual according to the laws of *Ceylon*, and for constituting it the first charge upon the estate, and for enabling *Caffary* to sell the estate in case the interest should be in arrear for three months, or the principal should not be paid within six months after payment should have been required. That the produce of the estate should be consigned to *Caffary*, he accepting *David Baird Lindsay's* bills against the produce, so as to provide the funds for cultivating the estate. That out of the moneys to arise from the sale of the produce, *Caffary*, should reimburse himself the bills drawn against the produce and keep down the interest on the mortgage, and should apply the surplus, if any, in reduction of the principal, if he should think proper ; and if not, then as the trustees should direct ; and that if the consignments should be duly made, the principal should not be called in before the 31st December, 1852,

and the trustees should not be at liberty to pay it off before that day unless *Caffary* should be willing to receive it. 1860. June 23.

It appears that, according to the laws of *Ceylon*, it is essential to the validity of deeds affecting immoveable property there, that they should be executed in the Island (Ord. No. 7 of 1840) and this deed, therefore, was not executed until the 15th of February, 1848, when the several parties executed it in the Island by attorneys appointed for the purpose. The respondent, *George Smyttan Duff*, who was the Manager of the *Ceylon* branch of the Oriental Bank, was the attorney by whom it was executed on the part of *Caffary*.

In order to effectuate the agreement with *Caffary*, it was necessary of course to provide for the negotiation of the bills for £4,000, to be drawn upon hin by *David Baird Lindsay*, and, accordingly, contemporaneously with the agreement entered into with *Caffary*, an arrangement was come to by the trustees with the Oriental Bank for the Bank's discounting those bills. This they agreed to do, on being guaranteed by the other executors and trustees of the Testator; and, accordingly, on the 20th of January, 1848, the appellants and *James Hadden* gave their joint and several guarantee to the bond for the payment of the bills to the amount of £4,000.

Upon the occasion of the power of attorney being sent by *Caffary* to *Duff*, empowering him to execute the deed of the 15th of February, 1848, on his behalf, *Caffary*, on the 24th of December, 1847, wrote to *Duff* to the effect, that when the deed was executed by the attorneys of the executors, *David Baird Lindsay* was authorized to draw upon him (*Caffary*) for the £4,000, to discharge the existing mortgage, and that the title-deeds of the estate were then to be handed over to *Duff*, and he requested that *Duff* would hold them on his behalf, and in answer to this letter, *Duff*, on the 15th of February, 1848, wrote to *Caffary* that the deed had been executed by the attorneys of the executors, and that *David Baird Lindsay* had negotiated through the Bank the bills to the amount of the £4,000, which was to be appropriated to the discharge of the mortgage, but that there had not been time to pay over the amount and receive the title-deeds. On the 19th of February, 1848, however, he again wrote to *Caffary* that everything requested in his letter of the 24th of December had been complied with. In fact, immediately upon the execution of the deed of the 15th of *February*, 1848, *David Baird Lindsay* drew upon *Caffary* for the £4,000 ; the bills were discounted by the Bank, and by means of the moneys thus raised, and of other moneys raised by bills drawn by *David Baird Lindsay* drew upon *Caffary* and discounted by the Bank, the mortgage was paid off, and the title-deeds of the estate were handed over to *Duff*.

It seems that by the rules of the *Ceylon* branch of the Orien-

1860. June 23. — tal Bank, collateral security was required to be given with bills on *England*, and that in consequence of *David Baird Lindsay's* having negotiated through the Bank the bills beyond the amount of £4,000, an arrangement was come to by *Duff* with *David Baird Lindsay*, who had then returned to *Ceylon*, that he should give a temporary mortgage of the estate, to become void on payment of the bills, subject to the mortgage in favour of *Caffary.* In pursuance, as it would seem, of this arrangement, an application was made to the District Court of *Kandy* by *David Baird Lindsay*, on the 28th of February, 1848, for the authority of that Court to mortgage the estate. This application proceeded upon allegations that the testator, at the time of his decease, was indebted to the amount of about £12,500, of which £8,500 was secured by mortgages which had become payable and had been called in, and that *David Baird Lindsay* held full authority from the other executors of the will to mortgage the estate, with a view to discharge the above claims, and to meet the necessary expenses attending the up-keep and cultivation of the plantations.

By an order of the Distict Court of *Kandy*, made upon this application, and dated the same 28th of February, 1848, it was ordered that *David Baird Lindsay*, as executor aforesaid, be authorized and empowered to mortgage so much of the testator's landed property in *Ceylon* as should be sufficient to raise £12,000, to be appropriated towards payment of the testator's debts, and the management and cultivation of the plantations; and on the 13th of March, 1848, *David Baird Lindsay*, executed an instrument of bond and mortgage in favour of *Duff*, in which he, *David Baird Lindsay*, was described as sole executor in *Ceylon* of the estate of *Martin Lindsay*, and whereby he bound himself, his heirs, executors and administrators, and all his property whatsoever, to *Duff*, in the penal sum of £4,000; and after reciting that he had passed and intended to pass bills drawn on *Caffary*, and payable to the Bank, to the amount of £2,000, he, as executor as aforesaid, duly authorized thereto by the District Court of *Kandy*, by the order of the 28th of February, 1848, in order to secure the due payment of the bills to the amount of £2,000, mortgaged the estate which was therein described as being the property of the estate of the late *Martin Lindsay* deceased, to *George Smyttan Duff*, and deposited the title deeds of the estate with him, but subject to a mortgage for £6,000, thereafter to be made in favour of *Caffary*, in pursuance of the articles of agreement of the 15th of February, 1848, and the bond was conditioned to be void, if, upon non-payment of the bills, the £2,000, with interest and expenses, should be paid by *David Baird Lindsay*, his heirs, executors, or administrators, upon demand.

In the month of May, 1848, before the bills which had been

had been drawn by *David Baird Lindsay* and negotiated through the Bank had become due, *Caffary*, on whom the bills were drawn, stopped payment, and there was at this time due to him, on his account with the testator's and trustees, a very large balance, a considerable portion of which, to the amount of upwards of £2,800, appears to be still remaining unpaid, 1860. June. 23.

In consequence of *Caffary's* failure, it became necessary that new arrangements should be made with reference to the payment of the bills which had been drawn on *Caffary*, and to the carrying on the cultivation of the estate ; and *David Baird Lindsay* accordingly again came over to this country : but before leaving *Ceylon* he was required by *Duff* to give further security to the Bank, and, accordingly on the 11th of July, 1848, he executed another instrument of bond and mortgage in favour of *Duff*, in which he was also described as sole executor in *Ceylon* of the estate of *Martin Lindsay*, and whereby he bound himself, his heirs, executors and administrators, and all his property whatsoever, to *Duff*, in the penal sum of £14,000, and after reciting that he had, by virtue of an agreement made between him and the devisees and trustees of the late *Martin Lindsay* with *Caffary*, dated the 15th of February, 1848, drawn the bills on *Caffary* for £4,000, and that *Caffary* had suspended payment, and that a bill which had been drawn upon him by Messrs. *Hudson & Chandler*, on account of the *Rajawelle* estate, and had become payable to the Bank, and which he had accepted, had been returned protested, and that the Bank had agreed to advance £230, on a bill drawn by him on his mother, to carry on the *Rajawelle* estate during his absence from *Ceylon*, and that other bills on *Shaw & Caffary* had been passed by him to the Bank, with shipping documents for coffee shipped, and which coffee was supposed not sufficient to cover the amount of the bills. He, as executor, as aforesaid, duly authorized thereto by the District Court of *Kandy*, by order thereof, dated the 28th of February 1848, mortgaged the estate, which in this instrument also was described as being the property of the estate of the late *Martin Lindsay*, to *Duff*, for securing the due payment of the bills of exchange and sums of money aforesaid, and the bond was conditioned for the payment on demand of the bills of exchange and other moneys aforesaid, with interest and expenses, but with a proviso, that the sum to be recovered upon it should not exceed £7,000.

David Baird Lindsay also, at the same time, executed a warrant of attorney to confess judgment, and consented to the issuing of execution upon the bond ; and on these securities being executed, *Duff*, on the same 11th of July, 1848, wrote and delivered to *David Baird Lindsay* the following letter :—

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"Oriental Bank, *Colombo*,
"11th July, 1848.

"Dear Sir,

"With reference to the £4,000 bill drawn by you on *Shaw & Caffary*, of *London*, on the 15th of February, 1848, at six months' sight, to the failure of those parties, and to the visit you now propose paying to *London*, to endeavour to form a new connection, I hereby agree, on the part of this Bank, that, provided the cultivation of *Rajawelle* is properly kept up, you shall not be proceeded against on the said bills in the event of their dishonour until your return to *Ceylon*, or say previous to the 1st Jany. 1849."

The arrangements thus entered into by *Duff* with *David Baird Lindsay* were, it appears, immediately communicated to the Bank in *London*. We do not, however, find amongst these papers the first letter by which this communication was made; but on the 15th of August, 1848, we find a letter from *Duff* to the Secretary of the Bank, stating to the effect, that these arrangements gave the Bank the first mortgage over the whole property to the full extent of their claim against *David Baird Lindsay* not otherwise covered, and in this letter, after referring to arrangements which had been proposed to the Bank by Mrs. *Lindsay*, *Duff* adds, "I suspect that Mr. *Lindsay* is not exactly in a position, at present, to carry out the arrangement proposed by his mother. The Bank of *Ceylon* have a claim of about £1,500 against him, a settlement of which is only delayed until his return to *Ceylon*, and he entered into an engagement with them not to mortgage the crops; and unless we make him a bankrupt at once, they may lay claim to their share of this year's produce."

It appears that the Oriental Bank, in the first instance, intended to leave the final settlement of the transaction to *Duff*, but they seem afterwards to have changed that intention; for early in November, 1848, they came to an arrangement with *David Baird Lindsay*, who had then arrived in this country, which was embodied in a deed, dated the 4th of November, 1848, and purporting to be made between *David Baird Lindsay*, described as one of the executors and devisees in trust of *Martin Lindsay*, of the one part, and *George Smyttan Duff* of the other part. By this deed, which was executed in this country by *David Baird Lindsay* and by the Secretary of the Bank here, and was intended to have been executed by *Duff* and by *David Baird Lindsay* by power of attorney in *Ceylon*, after reciting amongst other things, that there was then due from *David Baird Lindsay*, as such executor as aforesaid, to the Bank, the sum of £7,000, or thereabouts, exclusive of interest, and that the Bank were also holders of bills to the amount of £2,000, or thereabouts, drawn by *David Baird Lindsay* on *Shaw & Caffary*, which were unpaid, but as collateral security for pay-

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ment of which the Bank held bills of lading and shipping documents of coffee; it was agreed, in substance, as follows: that *David Baird Lindsay*, as such executor as aforesaid, should forthwith assign to *Duff* all crops of coffee then grown and being on *Rajawelle*, or which should be grown or produced thereon for the space of two years next ensuing, and should deliver over all such crops to *Duff*; and that in case *David Baird Lindsay* should omit to do so, *Duff* should have power to gather the crops, and to consign the same to the Bank in *London* for sale; that *David Baird Lindsay* should continue to manage the estate subject to the control of the Bank or of *Duff*; that *David Baird Lindsay* should not, during the said term of two years, mortgage the estate or the crops without *Duff's* consent; that the Bank would during the two years or such part thereof as *David Baird Lindsay* should fulfil the agreement, advance for the cultivation of the estate such sums as should be necessary for the purpose, after applying the nett proceeds of the crops of coffee, but so as not to exceed in any year a certain average sum for every hundred-weight of coffee delivered to the Bank in that year; that the proceeds to arise from the sale of the coffee should be applied, first, in payment of the expenses of cultivation; secondly, in payment of £40 monthly to the appellant, *Elsy Lindsay*; thirdly, in payment of the sums advanced by the Bank for cultivation, with interest; and fourthly, in reduction of the £7,000, and of so much of the £2,000, as the shipments of the the coffee appropriated to the payment thereof should be insufficient to satisfy; that at the expiration of the term of two years, the Bank should have power to sell the estate, and that the proceeds of the sale should be applied in payment of the £7,000, and £2,000, and of all other moneys advanced by the Bank, and as to any surplus upon the trusts of the Will of *Martin Lindsay*, and that nothing therein contained should prejudice the rights of the Bank or of *Duff* over the estate under their two several bonds and mortgages, or over the title-deeds or any other property secured by the bonds.

This deed, it appears, was forwarded by the Bank to *Duff* on the 24th of November, 1848, with a power of attorney from *David Baird Lindsay* to a Mr. *Moir*, authorizing him to execute the deed on his, *David Baird Lindsay's* behalf; but the deed was never executed by Mr. *Duff*, nor, so far as appears, by *Moir*, for before it reached *Ceylon*, *Duff*, notwithstanding the undertaking contained in his letter of the 11th of July, 1848, had taken the following proceeding in the Island.

On the 30th of November, 1848, he commenced the suit No. 8,997, mentioned above, against *David Baird Lindsay*. By the libel in this suit, after setting forth the bond of the 11th of July, 1848, it was alleged that the sums mentioned in the bond to be

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Notwithstanding the transmission to *Duff* of the deed of the 4th November, 1848, the execution was not withdrawn, the Bank alleging that in the negotiations which they had had with *David Baird Lindsay* he had misled them as to the power which *Duff* held over the estate and its produce. This was the state of matters when *David Baird Lindsay*, again returned to *Ceylon*, about the month of December, 1848. He took no steps to impeach the proceedings which had been taken by *Duff*, and, on the contrary, in a letter which he wrote on the 29th of January, 1849, to *Ingleton*, who had been in the management of the estate during his absence, and at the time when the property was seized under the execution, he expressed himself thus:—" The steps which you took with the Bank were perfectly correct. It was no use attempting to resist."

Under these circumstances the estate was put up to sale by the Fiscal on the 5th of March, 1849, and was purchased by *Duff*, on behalf of the Bank, for £2,500, and *Duff* thereupon entered into possession of the estate. By order of the District Court, dated the 11th of July, 1849, this sum of £2,500, was ordered to be set off against the debt due to the Bank, and by a deed, dated the 6th of September, 1849, reciting that, by virtue of the writ of execution, the Fiscal had caused to be seized and taken the property thereinafter described, and further reciting the sale and the order for crediting *Duff* with the purchase-money against the debt, and that thereby *Duff* had become entitled to all the rights, title, and interest, of *David Baird Lindsay* in the property the Fiscal conveyed the estate to *Duff* in fee.

The £40 per month, by the deed of the 4th of November, 1848, agreed to be paid to Mrs. *Lindsay*, was paid to her by the Bank down to the month of April, 1849, but in April, 1849, the Bank discontinued the payment upon the same allegation, that they had been misled by *David Baird Lindsay* in their negotiations with him. They afterwards agreed however, to pay Mrs. *Lindsay*, £25 per month, irrespective of the arrangement made by the deed of November, 1848, and without prejudice, and they continued to make this payment to Mrs. *Lindsay* down to the month of April, 1850, and, perhaps, longer; but the exact time when this payment was discontinued does not appear. 1860. June. 23.

In the month of May, 1852, the Bank sold the estate to Colonel *Brown George Symttan*, and *James Ingleton*, for the sum of £10,000; and by a deed poll, dated the 4th of May, 1852, *George Symttan Duff*, in consideration of £5,000, paid by Colonel *Brown*, £2,500, paid by *George Symttan*, and £2,500, paid by *James Ingleton*, conveyed the estate to those parties in fee, that is to say, as to two fourth-parts to Colonel *Brown*, one fourth part to *George Symttan*, and one fourth-part to *James Ingleton*. *James Ingleton* had been, as has been stated, the manager of the estate; Colonel *Brown* was the father-in-law of the respondent, *George Symttan Duff*; and it appears that this respondent advanced to Colonel *Brown* part of the moneys which were required by him to enable him to complete the purchase on his part. The respondent, however, denies that he was interested in the purchase. It does not appear that there is anything to cast suspicion upon *George Symttan* in reference to his connection with the purchase.

The libel in the suit out of which this appeal arises, was filed on the 21st of May, 1853, and answers having been put in, a great deal of evidence, both documentary and parol, has been entered into on both sides. Their Lordships, however, in the view which they have taken of the case, do not think necessary to go at length into the evidence. It is sufficient to state that, in their opinion, it establishes the facts as above detailed, that it leaves no doubt in their Lordships' minds that the mesne profits have been fairly and justly estimated, and that the case attempted to be proved on the part of the defendants, that *Duff's* proceedings in *Ceylon* were occasioned by the cultivation of the estate not having been properly kept up, is by no means established to their Lordships' satisfaction. Their Lordships have entered thus at length into the details of this case, considering that although there are many points arising upon the facts which it is not necessary, and would not, indeed, be right, for them now to decide, it is upon the whole case, and not upon any detached portion of it, that their judgment depends.

A formal objection to the suit was raised on the part of the respondents which it may be convenient first to dispose of. It

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was objected on their part, that *George Smyttan* and the Oriental Bank ought to have been made parties to the suit ; but this is an objection of form and not of substance, and is one, therefore, to which their Lordships would be most unwilling to accede. They do not find that the objection was pointedly, if at all, insisted upon by the answers, nor do they find that either *Smyttan* or the Oriental Bank was within the immediate jurisdiction of the Court, and they readily adopt the view which seems to have been taken by the Supreme Court on this point, that the objection was not one to which weight ought to be given, unless the justice of the case required it. It does not appear to their Lordships that this was the case. They see no grounds on which it could be necessary to add these parties to the record, unless there was a right of contribution or of resort over against them ; and if the respondents, the defendants of the suit, were wrong-doers as to the plaintiffs (the appellants), each liable *in solido* to them, their Lordships are by no means prepared to say, that they were entitled to set up any such right to the prejudice of the plaintiff's claims against them, even assuming the case to be wholly in equity. At all events, their Lordships are satisfied that any possible injustice will be obviated by the course which they are about to recommend for Her Majesty's approval, and they have no hesitation, therefore, in over-ruling this objection, and proceeding to dispose of the case upon the merits.

On considering the case upon the merits, the questions which arise appear to their Lordships to resolve themselves into two distinct classes ; the one relating to the claim of the appellants to recover the estate, and the other the claims of the respondents against the estate. The burthen is, of course, upon the appellants as to the one class, and upon the respondents as to the other. As to the first class of questions, the title of the respondents to this estate rests upon the purchase made by them from the Oriental Bank, who became the purchasers of the estate at a sale made under an execution upon a judgment obtained, in effect, by the Bank against *David Baird Lindsay*. The first point to be considered, therefore, seems to be, whether the estate was properly taken in execution and sold under the judgment. We were not referred, in the course of the argument, to any peculiar law prevailing in the Province of *Kandy* which could affect this question, or indeed any other of the questions which arise in the case, nor have we been able to find that any such peculiar law exists. The case, indeed, was argued before us on both sides as depending upon the English law, and was so treated in the Courts of *Ceylon*, and it is sufficiently evident from the proceedings in the cause that they were not taken under the Roman-Duch law which prevails generally in *Ceylon*. We consider, therefore, that the question must be determined according to the principles of the English law. It is to be

considered then whether according to that law, this estate was properly seized and sold under the judgment. Now, the action on which this judgment was founded, was brought upon the bond of the 11th of July, 1848, by which *David Baird Lindsay* was bound for the payment of the sum of £7,000. It was upon the obligation created by that bond the action proceeded. *David Baird Lindsay* is described in the bond as the sole executor in *Ceylon* of the testator, *Martin Lindsay* ; but although he is thus described in the bond, the condition of the bond is for the payment by him, his heirs, executors and administrators; and their Lordships do not think that the description in the bond can in any way alter the liability upon it, or convert the debt which was by law his personal debt, into a debt due from the estate of the testator. *David Baird Lindsay* could not, as their Lordships think, have pleaded to the action that the debt was not due from him personally, but from him in his character of executor only. Again, the warrant of attorney on which this judgment was entered up is from *David Baird Lindsay* personally, and does not even purport to be given by him in his character of executor; but what seems to be even more decisive on this part of the case is, that the judgment is that the plaintiff do recover from the defendant; that the order for the execution, is for execution against the property of the defendant, and that the writ of execution is to levy of the houses, lands, goods, debts, and credits of *David Baird Lindsay.* It is to be seen, then, whether this estate, was the property of *David Baird Lindsay.* Their Lordships are of opinion that it was not. It is not disputed that the estate was well devised by the will of *Martin Lindsay.* It was thereby devised not to *David Baird Lindsay* alone, but to him and the other trustees. It is clear that all the trustees, except *Henry Lindsay,* accepted the trust, and the estate, therefore, vested in them all. It was argued, on the part of the respondents, that *David Baird Lindsay* having been the sole executor in *Ceylon,* had full power over the estate, and several passages were cited from the *Dutch Executors' Guide* in support of that position; but these passages, as their Lordships understand them, relate to the powers of a Dutch executor over property governed by the Dutch law. They have no bearing upon the question of the power of one of several executors and trustees over property, the disposal of which is made under, and governed by, the English law. It was attempted, too, on the part of the respondents, to give effect to this judgment, and to the proceedings under it, against this estate, by reference to the power given by the Order of the *Ceylon* Court to *David Baird Lindsay* to mortgage the estate to the amount of £12,000; but without reference to the question whether this power was well created; and their Lordships are by no means satisfied that it was, having regard particularly to there having

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1860. June 23. — been no proof of the allegation on which the order proceeded that *David Baird Lindsay* had full authority from the other executors to make the mortgage; their Lordships do not consider that *David Baird Lindsay's* power to mortgage the estate can be called in aid of this judgment and the proceedings upon it. The bond and mortgage, although comprised in the same instrument, are different securities, leading to different modes of proceeding; and the power to create the one cannot, in their Lordships' judgment, have any influence upon the question as to the validity or invalidity of the proceedings under the other. There are other considerations which may affect the validity of this judgment and of the proceedings under it; the amount of the debt for which it was entered up; the times at which the several parts of the debt were payable; and the circumstances under which the judgment was obtained and the execution issued: but these considerations, although they might affect the case as between the appellants and the Bank, might not, perhaps, be available to the appellants as against the respondents; and their Lordships, therefore, must not be understood to rely upon them. They rest their judgment upon the question as to the validity of the seizure and sale of the estate upon the fact, that the estate was not the property of the judgment debtor, and that so far as he had any interest in it which was liable to be taken under the judgment, that interest was vested in him as a trustee only.

It was argued, however, on the part of the respondents that whatever might be the rights of the appellants against the Bank, they had no such rights against the respondents. That the respondents were purchasers for value without notice, but it is clear that the respondents are affected with notice. Their very purchase-deed refers to the conveyance by the Fiscal to the Bank. That conveyance refers to the judgment; the judgment refers to the bond and to the order of Court; and both the bond and the order of Court refer to the will by which the estate was devised to the trustees. It cannot be doubted, therefore, that the respondents must be taken to have had notice of the will, and of the devise to the trustees which it contains: but independently of the notice which is thus traced to the respondents, their title rests wholly on the judgment; and as purchasers from those who purchased under that judgment, they were surely bound to see that the proper parties were before the Court to be bound by the judgment which was the root of their title. Moreover, if the Fiscal had not, as their Lordships think he had not, any authority to seize or sell the estate, it is difficult to see how his conveyance could pass any title to the Bank, or through them, to the respondents.

The responpents, therefore, as it seems to their Lordships, have failed to establish any title to the estate against the appellants

by the direct operation of the conveyance under which they claim; and it follows, therefore, as their Lordships think, that the possession must be restored unless the respondents are entitled to maintain their title upon some other ground. It has been argued on their behalf that they are so entitled; that the Courts in *Ceylon* having both a legal and equitable jurisdiction, and the case presenting mixed questions of law and equity, the appellants can have no relief, without, as it is said, doing equity by giving effect to the equitable claims of the respondents; but the possession of the respondents was illegally taken, and is illegally held, and their Lordships are not prepared to go as far as far as the District Court has gone, in decreeing payment to the appellants of the mesne profits of the estate. They think that there are some views of this case in which the respondents may be able to establish a title to those profits, instead of being paid to the appellants, as directed by the District Court, ought to be paid into Court, and impounded until the respondents shall have had the opportunity of asserting their claims. Whether they will assert their claims or not, and upon what particular grounds they will rest their claims if they think proper to assert them, it is for them and not for their Lordships to determine. Their Lordships desire only to be understood as giving no opinion as to the validity or invalidity of those claims. They do not think it would be right for them to enter at all into this part of the case. The case has been so complicated by the course which has been pursued, that it would be difficult, if not impossible, to unravel it in this suit, and their Lordships are not satisfied that they have before them all the parties who may be interested in the questions of equitable right.

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It remains, then, only to consider the question of costs; and as to this point their Lordships are of opinion that no costs ought to have been given against the plaintiffs, the appellants in the Supreme Court, and that the costs of this appeal ought to be borne by the respondents, except the Oriental Bank Company, as to whom their Lordships agree with the Courts in *Ceylon* that there was no foundation for the suit.

Their Lordships will, accordingly, humbly recommend Her Majesty to reverse the decree complained of, to restore the decree of the District Court, so far as it relates to the defendants being ejected, and the plaintiffs restored to the possession; to vary the decree of the District Court, so far as it directs the mesne profits to be paid to the appellants; and order those mesne profits to be paid into Court; to direct an account of subsequent rents received by the respondents, and order the amount found due to be also paid into Court. The moneys to be paid into Court not to be paid out without notice to the respondents until the expiration of six months from this time, with liberty to the respondents in the

1860 June, 23. — meantime to take such proceedings as they may be advised for asserting their claims to the said moneys or any parts or part thereof, or to the said estate, otherwise than under or by virtue of the judgment, or any proceedings thereon. The order to be without prejudice to such claims.

Liberty to all parties to apply to the Court.

The respondents, *Duff* and *Ingleton*, to pay the appellants' costs of the appeal.

The following Order in Council was made:—

It is hereby ordered, that the said decree of the Supreme Court of *Ceylon* of the 8th of March, 1856, be, and the same is hereby reversed, and that so much of the judgment of the District Court of *Kandy*, of the 16th of April, 1855, as directed that the defendants (respondents) be ejected from the premises, and that plaintiffs (appellants) as devisees in trust of the estate of *Martin Lindsay* be restored to and quieted in possession thereof, and that the defendants (respondents) do pay the costs of suit except as therein mentioned, be, and the same is hereby restored; but that so much of the said judgment of the said District Court as ordered mesne profits to the amount of £6,457. 3*s*. 1*d*. sterling to be paid in certain proportions by the respondents, *George Smyttan Duff*, and *James Ingleton* to the appellants be, and the same is hereby varied by ordering, and it is hereby ordered, that the said mesne profits of the estate be paid by the said last-mentioned respondents in the like proportions into the Registry of the Supreme Court of *Ceylon*, and that an account of the subsequent rents and profits of the estate in question received by the respondents, *George Smyttan Duff* and *James Ingleton*, or either of them, or by their or either of their orders, or for their or either of their use, since the 21st of May, 1853, be taken, and that the amount which may be found due upon such an account be also paid by the said respondents into the Registry of the said Supreme Court. And Her Majesty is further pleased to Order, and it is hereby ordered, that the moneys so paid into Court be not paid out without due notice to the respondents, *George Smyttan Duff*, and *James Ingleton*, until the expiration of six months from the date of this order, with liberty in the meantime to take such proceedings as they may be advised for asserting their claim to the said moneys or any part or parts thereof, or to the said estate otherwise than under or by virtue of the judgment in the suit No. 8,997 bearing date the 30th of November, 1848, or under or by virtue of any proceedings in the said judgment. And Her Majesty is hereby pleased to declare that this Order is without prejudice to such claims, and that all parties are to be at liberty to apply to the Supreme Court herein; and it is hereby ordered that this case be

and the same is hereby remitted back to the Supreme Court of *Ceylon* with directions to give effect to the same. * 1860. Sept. 17.

29th June.

Present:—Creasy, C. J., and Sterling and Morgan, J. J.

C. R. Avisawelle, No. 12. } *Punchy Ralle* v. *Herea*

In affirming the judgment of the Court below, the judgment of the Supreme Court was as follows:— Petition of appeal.

With reference to the observations of the commissioner, the Supreme Court deems it necessary, to call his attention to the Rules, which do not require the drawer of a petition of appeal to affix his signature thereto, or witnesses to attest the signature of the appellant. Where the Court has well-founded reason to doubt the genuineness of the signature, or mark affixed to the petition of appeal, it should not reject the petition, but it should receive it and send for the appellant, to ascertain whether the signature or mark affixed is his. Any other course of proceeding is unauthorized by the Rules, and only calculated to throw difficulties in the way of parties, who seek their legitimate remedy by appeal.

17th September.

Present:—Creasy, C. J. and Morgan, J.

C. R. Panadura, No. 1105. } *Peris* v. *Dissanayeke.*

The Supreme Court set aside the judgment of the Court below and remanded the case for a new trial, with liberty to the plaintiff to amend his plaint by setting out the original debt. It held,— Promissory note—want of stamp—proof of original debt.

The giving of a note or bill, without a proper stamp, in discharging a prior debt, will not preclude the creditor from proving his original debt by other evidence, *Brown* v. *Watts*, 1 Taunt 353; *Wilson* v. *Vysar*, 4 Taunt 288 ; *Farr* v. *Price* 1 East 58 ; Chitty *on Stamps*, (2nd ed.) 75.

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* See next page, under date Oct. 6th, for further proceedings in this case.

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6th October.

Present:—Creasy, C. J., and Morgan, J.

D. C. Kandy No. 26656 } *Lindsay* et al v. *Oriental Bank Corporation* et al.

General judgment—liability of several defendants thereon.

For the facts of this case, see pp. 37 to 53, *ante*.

In terms of the decree of H. M. in council, reported as above, plaintiffs were put in posession of the estate and they now moved as follows :

" 1st. That the defendant *George S. Duff* be ordered to pay to the plaintiff the sum of £701. 6. 7, being the costs in appeal before the Privy Council.

" 2nd. That the said *George Smyttan Duff* be ordered to pay into the Registry of this Court the sum of six thousand, four hundred and fifty seven pounds, three shillings and one penny, being amount of the mesne profits from 1st February 1849 to 21st May 1853.

" 3rd. That the record be remanded to the District Court of Kandy to take account of the mesne profits from the 22nd May 1853 to 15th August 1860, being the date on which possession of Rajawelle Estate was given to the plaintiffs and appellants."

Dias appeared for plaintiffs, and *Rust* for defendant *Duff*.

The Supreme Court made the following order, wherein are set out all the facts pertinent to the matter:—

In giving judgment on the motion made in this case, it is necessary to recapitulate briefly the chief anterior proceedings.

The suit was instituted in the District Court of Kandy to recover prossession of the Rajawella Coffee Estate aud profits, and for other purposes which it is unnecessary to recount here.

The District Court gave judgment in favour of the plaintiff and ordered that they do recover from the defendants mesne profits to the amount of six thousand four hundred and fifty seven pounds three shillings and one penny in the following proportions: from the defendant *G. S. Duff*, from 1st February 1849 to 4th May 1850, and from defendant *G. S. Duff*, as executor of the Estate of Colonel *Brown*, and *J. Ingleton*, from 4th May 1850 to 21st May 1853, at the rate of one thousand five hundred pounds per annum.

The defendants appealed to the Supreme Court of this Island which reversed the judgment of the District Court and dismissed the suit with costs.

The plaintiffs appealed to Her Majesty in Council against the decision of the Supreme Court of this Island, and on the 30th June 1860 Her Majesty ordered among other things as follows: " That the said decree of the Supreme Court of Ceylon of the 8th March 1856 be, and the same is hereby reversed, and that so much

of the judgment of the District Court of Kandy of the 16th April 1855 as directed that the defendants (respondents) be ejected from the premises and that the plaintiffs (appellants,) as devisees in trust of the Estate of *Martin Lindsay* be restored to, and quieted in possession thereof, and that the defendants (respondents) do pay the costs of suit, except as therein mentioned, be and the same is hereby restored ; but that so much of the said judgment of the said District Court as ordered mesne profits of the amount of six thousand four hundred and fifty seven pounds three shillings and one penny sterling to be paid in certain proportions by the respondents *George Smyttan Duff* and *James Ingleton* to the appellants be, and the same is hereby varied by ordering, and it is hereby ordered, that the said mesne profits of the Estate be paid by the said last named respondents on the like proportions into the Registry of the Supreme Court of Ceylon ; and that an account of subsequent rents and profits of the estate in question received by the respondents *Duff* and *Ingleton*, or either of them, or by their or either of their order, or for their or either of their use since the 21st May 1853 be taken and that the amount which may be found due upon such an account be also paid by the said respondents into the Registry of the said Supreme Court : and Her Majesty is further pleased to order, and it is hereby ordered, that the moneys so paid into Court be not paid out without due notice to the respondents *George Smyttan Duff* and *James Ingleton* until the expiration of six months from the date of this order, with liberty in the mean time to take such proceedings as they may be advised for asserting their claims to the said moneys or any part or parts thereof, or to the said Estate, otherwise than under or by virtue of the judgment in the suit No. 8,997 bearing date the 30th November 1848, or under or by virtue of any proceedings on the said judgment : and Her Majesty is hereby pleased to declare that this order is without prejudice to such claims, and that all are to be at liberty to apply to the said Supreme Court herein, and it is hereby ordered that this cause be, and the same is hereby remitted back to the said Supreme Court of Ceylon with directions to give effect to the said report, and that the same be punctually observed, obeyed and carried into execution."

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Possession of the estate was given to the plaintiffs on the 25th August 1860, and the motion which we now have to dispose of has relation to the costs and mesne profits.

The motion was made against Mr. *Duff* only : the form of it as settled by the counsel for the plaintiffs was as follows:—

"I move, first—That the defendant *George S. Duff* be ordered to pay to the plaintiff the sum of seven hundred and one pounds, six shillings and seven pence, being the costs in appeal before the Privy Council.

1860. Oct. 6. — "2nd. That the said *George Smyttan Duff* be ordered to pay into the Registry of this Court the sum of six thousand, four hundred and fifty seven pounds, three shillings and one penny, being amount of the mesne profits from 1st February 1849 to 21st May 1853.

"3rd. That the record be remanded to the District Court of Kandy to take account of the mesne profits from the 22nd May 1853 to 25th August 1860, being the date on which possession of the Rajawella estate was given to the plaintiffs and appellants."

The first branch of the motion was disposed of almost by consent. The counsel for Mr. *Duff* at first objected that the payment of the costs therein mentioned was not ordered by the judgment of the Privy Council, but on its being pointed out that such payment is ordered by the Report recited in that judgment, which report is adjuded to be approved of by Her Majesty, and which report this Court is directed to observe and execute, no further opposition was made to that part of the application, and an order of the Court in that behalf was made on the 17th day of September and these costs have been paid accordingly.

There is no dispute as to the second branch of the rule so far as regards the sum of one thousand seven hundred and eighty five pounds, which is admitted to be payable by Mr. *Duff* for the mesne profits from 1st February 1849 to 4th May 1850. The dispute is as to the extent and nature of Mr. *Duff's* liability in respect of the sum of four thousand five hundred and eighty two pounds, three shillings and one penny, which represents the mesne profits from 4th May 1850 to 21st May 1853, and which, with the above mentioned sum of one thousand eight hundred and seventy five pounds, make up the amount of six thousand four hundred and fifty-seven pounds, three shillings and one penny, mentioned in the judgments of the District Court and of the Supreme Court of Appeal.

With respect to the said sum of four thousand five hundred and eighty two pounds, three shillings and one penny, the plaintiffs contend that Mr *Duff* is under the judgments in this case liable to pay the whole amount. Mr. *Duff*, by his counsel, contends that, as it is a general judgment for that amount against him and another, he is only liable to pay a moiety.

The case is one of very great importance. This court is most anxious to observe, obey and quickly carry into execution the judgment of Her Majesty in Council, and to give full and accurate effect to the Report of the Judicial Committee in this matter. The sum of money in question is considerable,—and it has become necessary in determining this case to investigate the Law of Ceylon respecting the effect of a general judgment against more than one defendant for the same sum : and we feel that the decision which

we are about to pronounce may practically influence the proceeding of our Courts and Fiscals in a very great number of cases.

We have therefore had this case argued before us, and we have given it our most earnest and careful consideration. We have come to the conclusion that Mr. *Duff* is only liable under these proceedings for a moiety of the sum of four thousand five hundred and eighty two pounds, three shillings and one penny.

The original judgment of the District Court of Kandy in our opinion (for reasons which will be presently set forth) gave the plaintiff a right to enforce payment of a moiety of the sum in question, and of a moiety only, from each of the two defendants, Mr. *Duff* and Mr. *Ingleton;* and we think, after careful and repeated examinations of the proceedings, especially of the language of the judgment of Her Majesty in Council and of the Report therein cited and enforced, that the said judgment of Her Majesty in Council has not, in this respect, varied the original judgment of the District Court,—but that, so far as regards the payment of the mesne profits, Her Majesty in Council has only varied the District Court's judgment as to what is to be done to the moneys when paid : it has made no change as to the parties and proportions from whom and which the payments are to be paid.

We will now state the grounds of our opinion on the several parts of the case.

First, as to the question by what law the case must have been governed if there had been no proceedings subsequent to the judgment of the Kandy District Court, and the plaintiffs were seeking to enforce their right under that judgment :

We take it to be quite clear that the extent of the liability of each defendant must have been then determined according to the Roman Dutch Law. The Ordinance No. 5 of 1852 is decisive as to this. It enacts that where there is no Kandyan Law or custom, having the force of law applicable to the decision of any matter or question arising from adjudication within the Kandyan Provinces, for the decision of which other provision is not specially made in that Ordinance, the Court shall, in any such case, have recourse to the law as to the like matter or question in force within the Maritime Provinces ; which is thereby declared to be the law for the determination of such matter or question.

There was, and there could be, no pretence in this case of any local Kandyan Law existing which could apply to it ; and the law therefore by which the question for adjudication was then to be determined, was the law in force in the Maritime Provinces. This is the Roman Dutch Law, with certain exceptions, not in the least affecting the matter now before us.

What then is the Roman Dutch Law as to the extent of the liability of one out of two or more defendants who had been jointly

1860. Oct. 6. sued, and against whom a general judgment has been given directing them to pay a certain sum?

The point does not appear to have been before this expressly brought before our tribunals. We were now only referred to two decisions as to costs, Galle D. C. 8262, Amblangodde, D. C. 1676.

But the authorities to which we habitually refer for guidance as to Roman Dutch Law are ample on this subject; and when they are well considered, there is not any discrepancy between them.

The counsel for the plaintiffs cited in this branch of the case, *Voet's* "Commentary on the Pandects," lib. 9, title 2, sec. 8.

"*Si plures simul damnum dederint, adversus singulos hæc æstimationis et ejus quod interest persecutio in solidum concessa est, sic ut unius præstatione cæteri non liberentur cum sui quisque, non alieni delicti pœnam solvat; sive constet æqualiter omnes occidisse dum simul trabem dejecerunt hominemque oppresserunt, sive alter tenuerit occidendum, alter interemerit; sive plures percusserint in rixa forte, nec appareat cujus ictu læsio aut cædes facta sit.*"

They next cited *Sande's Decisiones Frisicæ*, p. 595, giving a decision of the Court of Friesland as to the "mulcta civilis" or *wergeld*, payable to the heirs of a man who had been killed by a number of brawlers, it not being known what hand had given the blow. He says, "*At dubitatum quandoque fuit an singuli rixantes et tumultuantes in hanc mulctam teneantur, an vero una mulcta ab omnibus sit solvenda; et curiæ magis placuit (15 Julii Anno 1624) singulos in solidum hanc mulctam solvere teneri.*"

Grotius, book 3, c. 32, sec. 15, and preceding sections (page 434 in *Herbert's* translation) were also referred to us as an authority that "wrong-doers are bound by natural law to make reparation each *in solidum*, provided that on the one paying, the other be exonerated.

They cited the dictum of *Pothier*, vol. 1, p. 409 (*Evans'* translation.)

The third case of obligations *in solido* is where several persons have concurred in any injury and are each liable to the reparation of it. "They cannot oppose any exception of discussion or division, being unworthy of it"—to which might have been added the words of the same great jurist a little earlier in the book: "So if the debt arises from an injury committed by four persons, each is debtor for the whole in respect of the person suffering the injury, but as between themselves, each is only debtor for his share in the injury, that is to say, for a fourth of the whole."

Wood's "Civil Law" was also referred to for a similar maxim.

But none of those authorities, and none that we have been able to find, do more than establish the proposition that a man, who has been injured by several wrong-doers, may sue any one whom he pleases, and make that one give him full compensation. But the

question is, whether, if the injured man think fit to proceed against two or more jointly, and obtain, not specific judgment that each or some one is to be bound to pay the whole amount, but a general judgment against them all for one sum, he can then make one of the co-defendants to pay him the whole sum ordered by the proportion; for half, if there were two co-defendants; for a third, if there were three, and so on. 1860. Oct. 6.

There is an abundance of authorities on this ; and the authorities are high and clear.

In book 7 of the Code, title 55: "*Si non singuli in solidum, sed generaliter tu et collega tuus una et certa quantitate condemnati estis: nec additum est, ut quod ab altero servari non posset, id alter suppleret: effectus sententiæ pro virilibus portionibus discretus est Ideoque parens pro tua portione sententiæ ab cessationem alterius ex causa judicati convenire non potes.*"

The commentary of the Dutch jurist *Perezius* on this, deals with the seeming difficulty of a wrong-doer's liability being diminished by a judicial sentence against him. He says: "*Si plures una sententia condemnati sunt, executio fieri debet non in solidum, sed pro virili tantum parte, etiamsi omnes sint simpliciter condemnati, ad unam et certam quantitatem, hoc modo, Titium et Caium et Sempronium L Titio in centum condemno.*

"*Et hoc utique verum est, etiamsi cæteri non sint solvendo, et cum revera singuli ante condemnationem fuerint in solidum obligati quia (ut paulo ante diximus tit. super) per judicatum prioris obligationis novatio inducitur, et prodest judicatum singulis, ita ut quisque videatur condemnatus, in parte sua et absolutus a solidi exactione: quæ quidem interpretatio et in stipulatione locum habet, 11 § 1 ff 1.* De duobus reis. *At dices, iniquum esse ut res adjudicata prosit ei contra quem est judicatum, quia ante condemnationem tenebatur in solidum, nunc tenetur pro parte virili. Respondeo, hic non omnino judicatum esse contra eum, nam ex parte absolvitur quodammodo, scilicet a solidi exactione: Res judicata non prodest judicato, quatenus est condemnatus; sed solum ex accidenti ei prodest, respectu ejus quod in condemnatione est omissum, id est, quatenus absolutus est a solidi exactione, qui ante condemnationem tenebatur in solidum.*"

Faber who is quoted by *Perezius* on this subject, distinctly says, (*Codex Fabrianus, p.* 870), that unless the judgment expresses that each defendant is bound in solidum *non tenentur singuli nisi ad viriles.*

The Pandects, book 42, tit. 1, sec. 43 declare, "*eos qui una sententia in unam quantitatem condemnati sunt pro portione virili ex causa judicati conveniri, et si ex sententia, adversus tres dicta Titius portionem sibi competentem exsolvit: ex persona cæ[illegible] [illegible]m ex eadem sententia conveniri eum non posse.*"

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Another Dutch jurist *Brunnemann* in his commentary on this passage, says, "*Si plures condemnatitur in una sententia, non censentur in solidum damnati, sed quilibet pro parte : quod Bartolus de eo etiam casu intelligit, ubi duo in solidum alias tenentur, et divisionis beneficio renunciarunt : nam nihilominus novum ex sententia exurgit beneficium divisionis, quia est, quod creditori imputari possit, cur non contra unum egerit.*" (42. 1. 43.)

The same writer, p. 894, makes a similar remark as the passage from the Code already cited.

The authorities which we have been reviewing shew that it is in the power of the Court, which gives judgment against two or more defendants, to make any of them liable *in solido* by inserting words to that effect in the judgment; and many cases might be suggested in which it would be right and proper to do so. But the District Court of Kandy did not do so here; and we are clearly of opinion that, under this judgment of the District Court, Mr. *Duff* could only have been required to pay a moiety of the sum in question.

The general effect of the proceedings subsequent to the judgment of the District Court, is, that that judgment was set aside by the Supreme Court of Ceylon, but that the judgment of Her Majesty in Council has revived it with variations. This is the manner in which the case has been dealt with by both parties during the argument on this motion. The dispute between them is as to what *are* the variations. The plaintiffs' contention is as follows: Even supposing that the matter might, under the original judgment, have been dealt with according to the Roman Dutch law, and that Mr. *Duff* would, under that original judgment, have been compelled to pay a moiety only, that judgment, has now been varied and each party has been made liable *in solido* by the ultimate Court of Appeal.

The learned counsel for the plaintiffs did not, for proof of this proposition, rely on any particular words of the judgment of Her Majesty in Council, or of the report of the Judicial Committee ; bnt he endeavoured to shew that certain passages in that judgment and report, which were seemingly opposed to his argument, were not so in reality when properly considered. The passages which we mean, are those which respectively recommend and order, "that the said mesne profits of the estate be paid by the said last named respondents in the like proportions into the Registry of the Supreme Court of Ceylon." It is maintained on behalf of the plaintiff that this direction about preserving the proportions, in which the parties are to pay, has reference solely to that distributive part of the District Court's judgment, which directed the profits for the time between the 10th February 1849 and the 30th April 1850, to be paid by Mr. *Duff*, which is different

from the directions given as to the payment of the mesne profits which accrued after that date. 1860. Oct. 6.

It seems to us more natural to understand the general words of the judgment and report of the Supreme Tribunal as generally applicable to the whole topic, and to consider that all the distributive regulations of the District Court, as to proportions of payment, are preserved and re-ordained by the judgment of Her Majesty. But we do not say that these passages would of themselves decide the case, if there were clear expressions to the contrary in other parts of the judgment and report: but no such expression can be found in either of those instruments.

The learned counsel for the plaintiffs chiefly relied on parts of the printed judgment of the Lords of the Privy Council, delivered on the 23rd June in the year, at the conclusion of which they stated the recommendations which they were prepared to make to Her Majesty. That printed judgment is not itself the order of Her Majesty, which we are to carry into effect, but of course it is entitled to our deepest respect and we have studied it anxiously before arriving at our decision. The words of the printed judgment, on which the plaintiffs mainly rely, are to be found at p. 15. Their Lordships are there dealing with an objection taken to the suit on account of the non-joinder of *George Smyttan Duff* and the Oriental Bank, and they use these words :

" They see no grounds on which it could be necessay to add " these parties to the record, unless there was a right of contri- " bution or resort against them ; and if the respondents, the defen- " dants to the suit, were wrong-doers as to the plaintiffs (the ap- " pellants) each liable *in solido* to them, their Lordships are by no " means prepared to say that they were entitled to set up any such " right, to the prejudice of the plaintiffs' claim against them, even " assuming the case to be wholly in equity."

All, however, that this passage imports is, that one injured party may sue one or more out of several wrong-doers, and is not bound to sue all; if he sues one, that one is liable *in solido*, unless the Court specially modifies such liability: if he sues two or more out of a larger number, those two or more are collectively liable to him *in solido* unless the Court specially modifies such liability, and the suit cannot be stopped by a plea of nonjoinder. Such, as we have said, is the Roman Dutch Law also on this subject. But their Lordships say nothing which implies that the plaintiffs here, who have sued a certain number of defendants and who have got, in this part of the case, a general judgment for the same sum against two defendants, have a right to make any one of the two pay *in solido* under that judgment; and it is this last question which is the matter for our present determination; not the question of non-joinder, to which their Lordships remarks are directed.

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Other passages in the same printed judgment were referred to, in which their Lordships spoke of certain questions with which they were specially dealing, as questions which they were to determine according to English Law. But this particular question, as to the liability of one defendant to pay *in solido* under the judgment against two, was not one of those questions, and is not decided by what was said as to those questions. Holding as we do, that Mr. *Duff's* liability under the original judgment as to the sum in dispute was only a liability to a moiety, we should be slow to consider that limited liability changed into liability *in solido,* not by any words in the judgment of Her Majesty, or in the report embodied in Her Majesty's judgment, and not by any express decision of the Lords of the Privy Council in their printed judgment, but by vague inferences and analogies, drawn from other parts of the printed judgment which expressly deal with other matters.

If, indeed, we were to determine this point by analogical reference to the report of the Lords of the Judicial Committee and the judgment of Her Majesty in Council on other points, there is a clear decision on a part of the case closely connected with the present, which appears to show an intention not to make any of the defendants liable *in solido* to the plaintiffs for mesne profits. We refer to that part of the judgment of Her Majesty in Council which deals with the mesne profits subsequent to the 21st May 1853. The printed judgments of the Lords of the Judicial Committee clearly shew (in the passage at page 16 already cited) that attention had been expressly called to the fact that *George Smyttan* had become interested in the estate to the extent of one-fourth; and that an objection on the ground of the non-joinder of *George Smyttan* was made and over-ruled; and it was in dealing with that objection that their Lordships used the words already cited "if the respondents, the defendants to the suit, were wrong-"doers as to the plaintiffs (the appellants), each liable *in solido* to "them, their Lordships are by no means prepared to say that they "were entitled to set up any such right to the prejudice of the "plaintiffs' claims against them, even assuming the case to be "wholly in equity." But what follows? Continue to read the printed judgments and it will be found that their Lordships proceed to say "at all events their Lordships are satisfied that any possible con-"jecture will be obviated by the course which they are about to re-"commend for Her Majesty's approval." To know what their Lordships recommend, we must turn to the report, as it is recited in the judgment of Her Majesty in Council, and which we are, by that judgment, ordered to carry into effect. The recommendation is not, and the consequent judgment is not, that *Duff* and *Ingleton* pay the whole mesne profits of that period, it is not that *Duff* or

Ingleton pay the whole mesne profits of that period, though in the judgment of the Lords of the Privy Council *Duff* and *Ingleton* are wrong-doers, who, with or without the co-operation of others, have deprived the plaintiffs of the lawful possession of their estate. But the recommendation is, and the consequent judgment is, " that " an account of subsequent rents and profits of the estate in question " received by the defendants (respondents), *Duff and Ingleton,* or either " of their or by their or either of their order or for their or either of " their use, since the 21st May 1853 be taken, and that the amount " which may be found due upon such an account be also paid by the " said respondents into the registry of the said Supreme Court." If it should turn out that *George Smyttan* has during this latter period received his fourth share of interest in the estate, neither *Duff* nor *Ingleton* is required to pay over the fourth that may have been so taken by *George Smyttan* or any portion of it. All that they have to pay is, what has been received by them or either of them. This seem to us inconsistent with the idea of the decision of the Supreme Court of Appeal having established a liability of each or any one defendant in this case under these proceedings to make recompense *in solido* to the plaintiffs for the wrong committed in depriving the plaintiffs of the profits of the estate. 1860. Oct. 6.

Another question was raised before us on this branch of the rule, which we have kept distinct from the important and intricate question which we have been hitherto considering. The rule is moved as against Mr. *Duff* personally. His counsel says that in respect of his liability to pay the whole or part of this sum of four thousand five hundred and eighty two pounds, three shillings and one penny, it ought to have beeen made against him as executor of *Alexander Brown,* and our attention has been called to the proceedings in the case, and especially to the judgment of the District Court. But in this respect the order of Her Majesty in Council is express. It says of the sum of six thousand four hundred and fifty seven pounds, which includes the four thousand five hundred and eighty two pounds, three shillings and one penny, that it is to be paid by the said last named respondents. On looking back to see who these last named respondents are, we find the nearest applicable antecedents are the words " *George Smyttan Duff* and *James Ingleton.*" The words of the corresponding portion of the report are precisely the same. Her Majesty's judgment requires of us " that the report be punctually observed and obeyed." We therefore do not feel ourselves at liberty to vary it, nor do we think that it would be respectful or proper in use to enter into the enquiry whether the omission of the words " as executor of *Alexander Brown,'*, after *Mr. Duff's* name in those parts of the report and judgment, was caused by inadvertence or design. We dwell the

1860. Oct. 6 — less on this point of the case because it was treated on both sides as of little or no practical importance.

We come now to the concluding part of his motion which has reference to the enquiry to ascertain the rents and profits since the 21st May 1853. In addressing the Court, the counsel for the appellants put this part of the motion in an alternative form, and asked that the account should be taken either by the District or Supreme Court: though in the form of the rule ultimately handed in, the alternative was omitted. The Order of Her Majesty in Council is addressed to the Supreme Court to execute and carry into immediate effect Privy Council judgments in such manner as any "original judgment or decree of the said Supreme Court can or may be executed." It appears to us that regard being had, as well to the general directions given in the Charter, as to the specific instructions issued in this case, we are ourselves bound to carry the judment of the Privy Council into effect, so far as we can act in this Court, and that we are only to employ the agency of the District Court where the process of this Court, which has no civil jurisdiction, is insufficient effectually to secure any particular object. Thus, for instance, this Court does not originally issue writs of execution against person or property, and it is necessary therefore to call in the agency of the District Court to carry into effect our orders requiring parties to pay any sum of money to which we hold them liable. But we have the power in certain cases to hear evidence in civil cases (sec. 35th clause of the Charter, and Ordinance No. 2 of 1852 clause 9), and can therefore ourselves comply with the requirements of the Privy Council judgment as to the accounting: and what we can do ourselves we feel that we are bound to do.

We are the more confirmed in this impression by the consideration that by taking evidence ourselves we should save the parties some portion at least of the delay and expense which an order referring them to the District Court would necessarily give rise to, and these are objects of moment in a suit pending since 1853.

It is ordered that the respondent *Duff* do pay into the Registry of the Supreme Court the sum of one thousand, eight hundred and twenty-five pounds, and two thousand, two hundred and ninety-one pounds, one shilling, six pence and half-penny, amouting to four thousand one hundred and sixty-six pounds, one shilling, six pence and half-penny in the whole. And that the District Court do upon the application of the parties issue the necessary writs of execution to enforce this order.

It is further ordered that the parties do appear before this Court on the twenty-sixth day of October instant, with their witnesses, for the purpose of taking the account directed by Her Majesty in Council.

On the parties appearing on the 26th October, the Supreme Court referred (27th Oct.) the account, directed to be taken by Her Majesty in Council, to the Registrar, with power to him to examine witnesses, if necessary. 1860.

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The Registrar submitted the following report:—

In obedience to the order of the 27th October 1860, directing me to take the account ordered of the Privy Council, and to report thereon, I have the honor to inform your Lordships that after a careful examination of the accounts by the parties themselves, they handed in a statement shewing a sum of sixteen thousand seven hundred and twenty six pounds and four pence (£16,726 0 4), to be due in respect of the profits of the Rajawelle Estate from 1853 to 1860. This sum exceeds by seven hundred pounds only that shewn in the respondent's, *Duff's* account. In arriving at this sum of sixteen thousand seven hundred and twenty six pounds and four pence (£16,726 0 4), which both parties admitted to be due, the question of interest and commission were not however settled between them. Interest (amounting to three thousand, nine hundred and sixty two pounds, one shilling and seven pence) has been charged by *Duff* in the accounts on the capital embarked, and commission (amounting to four thousand one hundred and forty three pounds, nine shillings and six pence) on the sales and purchases on account of the estate. Both of these charges appear to me to be reasonable and proper. The capital embarked in the undertaking was the purchase money paid for the estate, and Mr *Shand*, Mr. *Nicol*, Mr. *Thompson*, Mr. *Murray Robertson* and Mr. *Christian*, all agree, that interest should be charged on capital in calculating profits. In the words of Mr. *M. Robertson* "the profits cannot be arrived at, without."

The charge for commission is in like manner proved by the gentlemen above named though differing somewhat as to the rate, it is also proved by Mr. *Brown*, called for the appellants; as to the rate, there is some slight difference: most however agreeing that 5 per cent is that rate, but all saying that it is the rate where no special agreement is made, being that agreed upon by the Chamber of Commerce. This commission also in rendering the accounts to the proprietors, was always deducted by Mr. *Duff*. There remains only to consider an item of one hundred pounds, being interest on a sum of one thousand pounds, borrowed for estate purposes, and since paid, and I can see no reason for treating this other than as interest on capital. I therefore think that the amount eight thousand two hundred and five pounds, eleven shillings and one penny inserted in the respondent *Duff's* accounts being interest on

Capital...	...£3962	1	7
Commission	... 4143	9	6
and interest on £1,000 borrowed	... 100	0	0

was properly so inserted, and should be allowed, and that the balance which was agreed to between the parties (reserving the determination of these questions), viz. sixteen thousand, seven hundred and twenty six pounds, and four pence, should be taken to be the rents and profits of the Rajawelle Estate from 1860. I beg therefore to report that the shares in which the proprietors held the estate and divided the profits were as follows:

Estate of *Brown*, *Duff* Executor	... one half
Ingleton	... one quarter
Dr. Smyttan	... one quarter

The profits divided in these portions would stand thus:—

Estate of *Brown*	...£8,363	0	2
Ingleton	... 4,181	10	1
Dr. Smyttan	... 4,181	10	1

1860. Considering the small amount added to the sum stated by *Duff* in his original account, only seven hundred pounds, of which nearly three hundred pounds is not money actually received, but "estimated profit," and considering the great difference between the sum now reported, due to the appellant and their claim, I beg to recommend that all costs of this reference be borne by the appellant.

Dias was heard for plaintiffs.

Rust for defendants.

The Supreme Court made the following order, on the 3rd November:—

It is ordered that the defendant *Duff* do pay into the Registry the sum of ten thousand three hundred and forty four pounds, eleven pence and half penny.

Costs to stand over.

The first objection to the Registrar's report is, that in ascertaining these mesne profits, he has deducted *inter alia* from the gross receipts a sum which represents the nature of the services rendered by Mr. *Duff* in managing the sale of its produce.

The principal was disputed, and to the amount of the charge. The rate of charge was admitted to be fair and reasonable; and in answer to questions from the Court, during the argument, it was distinctly admitted on the side of the appellent that such services as Mr *Duff* performed were absolutely necessary in order to realize the profits of the crops; and that if they had been performed by any ordinary hired commission agent, the expense to the estate would have been greater.

The Supreme Court thinks the deduction proper.

It is conceded on all hands that in order to ascertain how much the defendants have received out of the estate during the time in question it would be absurd and unjust merely to reckon the incomings. These give the mere gross ; all fair and actual outgoings must be deducted in order to get the net receipts, that is, the real receipts in the true sense of our enquiry. The outgoing in question actually took place; it occurred honestly and *bonà fide*, and the Supreme Court does not think the appellants ought to profit by its effects without allowing for the costs.

The true spirit of these proceedings is, or ought to be, a desire to re-instate the plaintiff so far as possible in the position of advantage, which they would have held if they had not been dispossessed by the defendants, during the time in question. This is all that ought to be sought. If the *Lindsays* had been in possession from 1853 to 1860, they would have received the proceeds of the crops, less, *inter alia*, four thousand one hundred and eighty three pounds four shillings and five pence for commission on sales. The Supreme Court thinks, that they have no right to it.

It is said that Mr. *Duff* is a wrong-doer, and ought not to take advantage of his own wrong. In the strict legal sense of the word,

Mr. *Duff* is undoubtedly a wrong-doer, for it turns out, at the end, that he did wrong in thinking himself and the co-defendants to be entitled to the Rajawelle Estate, and in acting accordingly. But there can seldom have been a conflict of claims to property, in which the *bonâ fides*, and moral integrity of the unsuccessful litigant, were more clear than in the case of Mr. *Duff*. The true sense in which the Supreme Court should understand an ambiguous word, is sometimes best illustrated by comparing it with other words, which are etymologically its co-equals, but which have respectively acquired more decided meanings. In saying that these defendants are "wrong-doers," this Court means that they are what our old Norman French law calls "*tort-feasors*." It would be absurd to say, that they are wrong-doers, in the popular sense of the word—"*malefactors*."

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The second item in dispute, is a deduction of three thousand eight hundred and sixty-two pounds, and seventeen shillings for interest on the original *purchase money*, by which the defendants obtained the estate. The Supreme Court thinks this deduction wrong. It would be monstrous for a defeated defendant, in ejectment, to claim from the rightful owner, the purchase money which he, the defendant, had given, and which enabled him to obtain his illegal possession.

The Supreme Court does not think that they can claim interest any more than they could claim capital. The Supreme Court intimated, during the argument, its disposition to allow interest on any *working* capital, that had been *bonâ fide* employed for the benefit of the estate, but the defendants have not wished the enquiry to be re-opened on this point.

Next, the appellants object to Mr. *Duff* being only required to pay the half of the profits ; which half was what he really received. They say that he ought to pay all, with regard to the argument, that each defendant in a case like this is liable to pay *in solido*. The Supreme Court considers that this point was decided by the judgment, which this Court recently delivered in this case ; and in which this Court examined at great length, and with great care, first, the question of what law was to regulate the respective liabilities of these co-defendants, in the joint judgment against them, and, secondly, what were the requirements of the Roman-Dutch Law on the subject. The Supreme Court adheres to that judgment for the reasons therein given, and this Court thinks that the language of the judgment of Her Majesty in Council, requires this Court to make such of the wrongful recipients of the profits of this estate, to repay what each had received ; and not to make any one pay for what has been taken by the others. The Supreme Court cannot give any weight to the argument that the moneys went first into the hands of Mr. *Duff*, as manager and

1860. Oct. 29. — banker, although he immediately credited *Ingleton* and *Dr. Smyttan* with the proper shares. The Supreme Court expressly enquired, whether Mr. *Duff* had paid any monies over, after the decision of the Privy Council was known, but it was agreed that this had not been done.

The last point brought before the Supreme Court regarded the costs. The Supreme Court thinks that the question of costs should stand over, until the Supreme Court sees what, if any, further proceedings were taken in the matter, according to the leave given by the Privy Council, to the defendant ; and what may be the result of such proceedings.

29th October.

Present: Creasy, C. J. and Morgan, J.

C, R. Jaffna, No. 25869 } *Folkard* v. *Anderson.*

Brute animal —injury —proof of *scienter*— liability of owner.

The Court set aside the judgment of the Court below, in these terms:—

This is an action brought on account of injuries which the plaintiff sustained from some dogs belonging to the defendant.

Evidence was adduced before the Commissioner of the Court of Requests as to the pernicious habits of the dogs, but he considered that there was no sufficient proof of the owner's being aware of their ferocity.

We agree with him in thinking the proof as to this point insufficient.

The Commissioner dismissed the case, holding that proof of owner's knowledge of the dog's mischeivous habits (technically called proof of the *scienter*) is indispensable for the plaintiff's right to a verdict.

According to English Law, the Commissioner's judgment would be correct. The English Courts hold that "the gist of the action is the keeping of the animal after *knowledge* of its mischievous propensities," per Lord Denman C. J., in *May* v. *Burdett*, 9 Q. B. 101. But according to the Roman-Dutch Law, which we are bound to follow, the decision ought to have been the other way. The Roman-Dutch Law does not require a man who has been injured by the mischievous animal of another man, to prove that the owner knew the animal's mischievous habits. The difference between the two systems of jurisprudence is pointed out by Lord *Campbell* in the very recent case of *Gething* v. *Morgan*, which is cited and referred to in a very able article of "The Jurist," on the liability of owners of animals for injury done by those animals.

Lord Campbell in *Gething* v. *Morgan* contrasted the law of Scotland (which like the Dutch Law is chiefly founded upon the Roman Law, though the Scotch and Dutch systems are not in all respects the same), with the Law of England upon this matter. His Lordship ruled that the circumstances of the case before him made the defendant liable and shewed sufficient proof of the *scienter* even according to the English law, but his Lordship added, according to the Law of Scotland, there is no occasion to shew the previous habits of the animal on the *scienter*, and where an injury has been done to an innocent person it certainly seems more reasonable that the loss should fall on the owner of the animal, which has done the mischief, than upon the party injured. 1860. Oct. 29.

Lord *Campbell* in these expressions evidently alluded to the well known jural principle that where one of two innocent persons must suffer, the loss ought to fall on the one by whose act or omission the loss has been caused.

As the rules of law respecting the liability of owners of animals are matters of frequent practical importance, we have, in framing our judgment in the present case, thought it desirable to deal more fully with the subject, than we should have done if cases of this kind were more rare.

It is a general rule of Roman-Dutch Law that the owner of a brute animal, which has injured another person, is liable for such injury, but the degrees of liability vary according to the nature and the habits of the animal, and the circumstances under which the injury was inflicted. The authorities on this branch of the law are most fully collected in the *Commentary* of Voet on the ninth book of the *Pandects*, tit. " Si quadrupes pauperiem fecisse dicatur." Van Leeuwen in the 39th chapter of his fourth book, being the chapter on " Obligations arising from causes similar to crime," is explicit on this subject. He also treats of it in the 31st chapter of his " *Censura Forensis.*" To these may be added Vanderwater's Commentary on the ninth chapter of the 4th book of the Institutes, the Commentary of Vinnius on the same, *Groenewegen de Legibus abrogatis. p. 54, and Grotius, pp. 252, 253, Herbert's Translation.*

The most ancient of all the authorities and the foundation of a great part of the law on the subject, is a law of the Twelve Tables, cited and incorporated in the Institutes and the Digest. By this law, an *actio de pauperie* was given to a person who had been injured by the brute animal of another, such brute animal being of a genus not naturally mischievous to mankind. The owner of the animal was under an alternative liability. He was bound to make good the damage, or to give up to the injured person the animal that had done the injury. The Ædelian Edict forbade the keeping of savage animals in or near the places of general resort and thoroughfares so as to endanger the public. If such

1860. Oct. 29 — an animal so kept injured a freeman, the owner was bound to make full compensation, and could not relieve himself from such liability by giving up the animal. Without discussing here in detail the subsequent legislation of Rome and Holland on the subject, we may state the general results, as applicable to the administration of justice in Ceylon, to be as follows:

Where a man's brute animal does an injury to another person, (such injury not being done through mere accident, and not being provoked and caused by the wrongful act of the injured party, and and not being immediately caused by the wilful act of a third person), the owner is always liable. But the owner's liability is limited, if the animal were not of a genus naturally savage, and if also the individual animal were not of mischievous habits. The limit of the liability of such an innocent owner is this, the amount to be given for compensation must not exceed the value of the animal which did the injury. But if the animal were of a savage *genus*, or if though not of a savage genus, it were of mischievous habits, whether the owner knew those habits or not, the owner must make full compensation for the injury done by the animal, and cannot limit the damages to be assessed against him by the amount of the animal's value.

There may be cases in which animals not mischievous by *genus* or by habit, may be kept in such places and under such circumstance as to make them dangerous to the public. If in such cases injury is done by such animals, the owner is liable to make full compensation.

Applying these principles to the present case, the Supreme Court finds abundant evidence that the dogs were of mischievous habit. There is also evidence as to the place and mode in which they were kept, which might be important as to fixing full liability on their owner, but that full liability is already established by the evidence as to the mischievous habits of the dogs.

It follows that there must be a verdict for the plaintiff. As the defendant's liability in this case is not limited by the value of the dogs, there is no need to remit the case for any evidence as to this to be taken. It is proved that the amount of the plaintiff's doctor's bill was three pounds and fifteen shillings. He asks in his plaint for this sum only, and it is therefore unnecessary to estimate what he might have received for personal suffering and annoyance. The judgment of the Court is, that the judment of the commissioner be set aside and that there be a verdict for the plaintiff for three pounds and fifteen shillings and costs.

1st November.

1860. Nov. 1

Present:—Creasy, C. J., Sterling, J. and Morgan, J.

C. R. Colombo, No. 3,103. } *Bastian Appuhami* v. *Palkan* et al.

Per Curiam.—Set aside and judgment directed to be entered in plaintiff's favor for the amount claimed aud costs. The promissory note being in its terms joint and several, evidence should not have been received to show that the second defendant was merely a surety. (*Abbot* v. *Hendricks*, M. & Gr. 794.) As respects the defence of the first defendant, it appears according to his own showing, that he did not deliver the brass pots within the time specified

Promissory note—joint and several—evidence—surety.

D. C. Kurunegala, No. 14068. } *Ranawatte Tikery* v. *Kottepitty Piunee* et al.

The Supreme Court affirmed the order of the Court below in in these terms:—

Estoppel—privies.

The doctrine of estoppel, so far as it applies to privies, proceeds on the principle that a party claiming *through* another is estopped by that which estopped that other respecting the same subject matter. Thus an heir, who is *privy in blood*, would be estopped by a verdict against his ancestor *through whom* he claims. *Lock*, v. *Norbourne*; *3 Mod. 141, Smith's Leading Cases, vol. 2 p. 619.*

The plaintiff in the present case does not claim *through* the plaintiff in the case No13747 nor are the interests claimed in the two cases indentical. The plaintiff in 13,747 and the plaintiff in this case are co-heirs, claming different portions of and interests in the same estate and from the same ancestor. The parties are identified in interest and the judgment in the former case will be evidence, and very weighty evidence in this. But it cannot be regarded as an estoppel, nor will it operate as such. *1 Taylor on Evidence, sec. 77* and *312.*

5th November.

Present:—Creasy C. J. Sterling, J. and Morgan, J.

P. C. Panedura No. 1383. } *Samerenayeke* et al v. *Fernando*

In the following judgment of the Court, the facts of the case are clearly indicated:—

Evidence—depositions in one case put in and read in another—consent—

In this case the defendant was charged before the Police Magistrate of Pantura with keeping a house for the purpose of promiscuous gaming, in breach of Ordinance No. 4 of 1841 sec. 19.

1860. Nov. 5 — irregularity — prejudice of substantial rights of defendant.

The persons who were found gaming in the house were charged before the same Police Magistrate under the fourth head of the fourth section of the same ordinance.

The case against the gamblers was taken first.

Evidence of the gambling and of the character of the place was regularly given against them, and they were duly convicted.

The charge against the present defendant for keeping the gaming house was then immediately called on. The defendant appeared and was defended by a Proctor.

It seems that both the defendant and his Proctor had been present while the former case was tried. The defendant pleaded "*not guilty*." No witnesses were sworn against the defendant. But the depositions which had been taken in the former case were read over, and the persons who had given those depositions were offered to the defendant for cross-examination. This offer was declined.

The defendant's Proctor consented to the depositions being put in and read as above mentioned

There was no other evidence against the defendant.

He was convicted, and appealed, and the Supreme Court has to determine whether the Magistrate in receiving the depositions against the defendant, with the defendant's Proctor's consent, and in convicting him on those depositions, committed an error in law "which prejudiced the substantial rights of the defendant."

It is only in the event of this Court being of this opinion that this Court can correct the proceedings.

The appeal came on first before His Lordship the Chief Justice sitting singly. He considered the question, whether consent can cure such irregularities and error in a criminal case to be one of great practical importance, and he therefore reserved it for the decision of the Collective Court. As the defendant was bailed, he has suffered no prejudice by the delay.

A cardinal principle of our criminal law, the rule that (with certain well known exceptions) all evidence given by witnesses against a prisoner must be given by witnesses sworn in the case to tell the truth, has been violated in this instance. These witnesses could not be indicted for perjury in reference to this case.

It would be difficult to indict them for perjury at all as to part of their evidence. Their statement as to the ownership to the house, as made by them in giving evidence against the gamblers might be plausibly argued to be a matter not so material to the issue then being tried as to make it legally possible to found and sustain assignments of perjury on those parts of the evidence. But in the case against the present defendant, those statements about ownership were the most material possible. Yet, as against the present defendant, those statements were not made on oath at all.

The Supreme Court thinks this to be such a breach of the

substantial rules of justice that no consent could make it legal; and this Court thinks it such a prejudice to the substantial rights of an accused man, that the interest which the public has in the due administration of criminal justice requires the error to be corrected, even though the individual consented to his own wrong. 1860. Nov. 5

The Supreme Court does not feel obliged to decide in this case, whether the consent of an accused party, or his Advocate in a criminal case, can ever dispense with any of the strict rules of evidence.

The Supreme Court is of opinion that no dispensation could be valid in the present instance.

The authorities on this subject are not numerous, probably because attempts to break the good order and the conscientious reverence for prisoner's rights which characterise the Criminal Courts of England and her Colonies, have been, and this Court trusts will always be, of very rare occurrence.

The Supreme Court has been referred to two cases in *Carrington* and *Payne's* Reports; one of them (vol. 7 p. 495) is the case of *Rex* v. *Foster*. There were two prosecutions against the same prisoner for felony. It was proposed in the second case that, as the facts were precisely the same, the evidence given already in the first case should be taken by consent; but Mr. Justice *Patterson* refused to allow this, and is reported to have said, "I doubt whether that can be done, even by consent, in case of felony, though I know that it may in a case of misdemeanour." Now, as our law in Ceylon has no distinction between one kind of offence and another, such as the English law makes between felonies and minor offences, it is far better to keep on the safe and humane side, and to make the strictness which the English law requires in cases of felony, universal in all criminal cases whatsoever.

The other case is in the 8th vol. of *Carrington* and *Payne*, p. 575, *Regina* v. *Thornhill*. There *Lord Abinger* refused to recognize admissions that have been made by arrangement between the attornies before the trial, but he is reported to have made his refusal in these words: "I cannot allow any admission to be made on the part of the defendant, unless it is made *at* the trial by the defendant or his counsel."

The Supreme Court may observe in this case that in point of fact no admission was received, and secondly that it was a case of misdemeanour which makes our remark on the preceding case of *Rex* v. *Foster* applicable.

The Supreme Court has indeed found a passage in the writings of one of the highest authorities on the laws of this Island, which forcibly implies that such a reception of depositions, as has been practiced here, is contrary to law. In Sir Charles Marshall's Reports there is a very careful and clear chapter on evidence, and he tells

1860. Nov. 5 — us (p 107) that it was composed with special reference to the state of things in Ceylon. At p. 147 Sir Charles says that "former depositions may also be received by consent of all parties in *civil* cases." The word "civil" is printed in italics; and it shews that our late eminent Chief Justice considered that consent in criminal cases would be sufficient.

The Supreme Court has said that it abstains, on the present occasion, from giving a general decision that none of the rules of evidence can ever be dispensed with in criminal cases by consent. But it is quite certain that Judges and Magistrates are never bound to sanction such arrangements, and the Supreme Court has no hesitation in recommending most strongly that those who preside in our minor criminal courts should never allow such waivers, but that all criminal charges whatever should be regularly proved before any man is convicted, whether he offers to consent to irregularities or not.

Even in civil cases, where much is often done or left undone by consent, it is always in the discretion of the Judge, and in his power, to reject illegal evidence, though both parties agree to admit it. In the words of Chief Baron *Pollock*, in the recent case of *Barbat* v. *Allen*, 21 L. J. Ex. 159, "a Judge is bound to administer the whole law of England, the law of evidence included, and although a practice has crept in of allowing objections to evidence to be waived, it is always a question with the presiding judge whether he will permit that, and he would always be justified in calling on the parties to adhere to the law." This duty of administering the whole law is emphatically more binding in criminal cases; and he, the Chief Justice, states, that in a practice of more than twenty years at the sessions and on the crown side on circuit in England, he never knew an instance, in a criminal trial, of proper legal proof being dispensed with by consent. He has more than once heard the counsel for prisoners offer to admit parts of the prosecutor's case, but the answer from the Bench, given too by Judges of the highest eminence, invariably has been, "I cannot try criminal cases on admissions, the facts must be regularly proved."

The present case must be remanded to the Police Court for evidence to be regularly taken and for judgment thereon to be given.

The Supreme Court thinks it right to add an expression of its belief that the Police Magistrate, who received these depositions against this defendant, did so in no spirit of unfairness, but out of a desire to expedite the administration of Justice,—a desire laudable in itself, and which this court should like to see more generally prevalent in this Colony; but it must not be allowed to prevail at the cost, or at the risk of impairing the great principles of our criminal jurisprudence.

C. R. Point Pedro } *Ayanker Nager* v. *Sinatty* 1860.
No. 41. Nov. 5

The judgment of the court below was affirmed in these terms:—

Right of way—Prescriptive Ordinance, No. 8 of 1834, cl, 2 [Ord. 22 of 1871, cl. 3] — "*possession* of lands or *immovable* property"—Servitude—*juris quasi* possession—user.

Possession "for ten years previous to the bringing of action"—construction.

In this case the plaintiff obtaiued a judgment in the Court below against the defendant for disturbance of a right of way over defendant's land, which the plaintiff claimed, as owner and occupier of adjoining land.

The plaintiff proved clearly that he and those who had held his (the plaintiff's) land before him, had exercised this right of way over the defendant's land for more than twenty years before the disturbance complained of ; but there was not sufficient proof that the right of way had been exercised for thirty-three and a third of a year, the period requisite, according to the old Dutch Law, for the acquisition of ȧ prescriptive right of way (see *Voet's* Commentary on the *Pandects*, vol. I, p. 409, and *Van Leeuwen's* Commentaries p. 190.)

It further appeared that for the greater part of the year 1857 and 1858, the plaintiff had not used the way, as the defendant had obstructed the road in question by placing a fence across it.

Afterwards the fence was removed and the plaintiff again exercised the right of way until the defendant again set up the fence. It was in respect of this last obstruction that the action was brought.

The Supreme Court thinks that the decision in favor of the plaintiff was right: though he failed to prove a right of way under the old Dutch Law, he succeeded in proving one under the Ordinance for the Prescription of Actions, No. 8 of 1834.

The second clause of that Ordinance is as follows:—

" And it is further enacted that from and after the first day of July next, proof of the *undisturbed and uninterrupted* possession by a defendant in any action or by those under whom he claims of lands or *immoveable property*, by a title adverse to or independent of that of the claimant or plaintiff in such action (that is to say, a possession unaccompanied by payment of rent or produce, or performance of service or duty or by any other act by the possession from which an acknowledgment of a right existing in another person would fairly and naturally be inferred) for ten years previous to the bringing of such action shall entitle the defendant to a decree in his favor with costs. And in like manner, when any plaintiff shall bring his action or any third party shall intervene in any action for the purpose of being quieted in his possession of lands or other immoveable property, to prevent encroachment or usurpation thereof, or to recover damages for such encroachment or to establish his claim in any other manner to such

1860. Nov. 5 — land or other property, proof of such undisturbed and uninterrupted possession as hereinbefore explained by such plaintiff or intervenient, or by those under whom he claims, shall entitle such plaintiff or intervenient to a decree in his favor with costs. Provided always that the said term of prescription of ten years shall only begin to run against parties claiming estates in remainder or reversion from the time when the parties so claiming acquired a right of possession to the land in dispute."

Two questions arise as to the effect and meaning of this Ordinance in this case.

The first question was this. Is enjoyment of a right of way included in the words " possession of lands or immoveable property?"

A judgment of this Court *(No. 22,606 D. C. Colombo)* was referred to, in which it was held that the plaintiffs, under the cirumstances of that case, were entitled to a right of way by prescription of a lost grant: but the *Chief Justice* in giving that judgment stated that the language of the Prescription Ordinance was not sufficiently precise to warrant the Court in holding that it applied to a servitude or incorporeal heriditament of that description.

From respect of the late learned *Chief Justice* who delivered that judgment, and also from a wish to maintain certainty and uniformity in the administration of justice, the Supreme Court attaches great weight to that decision ; but this Court nevertheless does not feel itself concluded by it on the present occasion.

The opinion expressed there as to the Ordinance was not essential to the decision then given in favor of the plaintiff.

The plaintiff maintained his judgment on another ground.

Moreover there is a conflicting decision of this Court, not indeed on this Ordinance, but on a Proclamation, so closely analogous as to make a decision on it operate as a high authority in determining what the words of the Ordinance fairly mean.

The Supreme Court speaks of a decision of this Court, *No.* 493 *Kandy*, 19*th Nov.* 1833, which is cited with approbation by *Sir Charles Marshall* in the 526th. page of his well-known *Reports.* The Supreme Court need hardly say how much additional value is given by such approval. The Supreme Court there held that the Proclamation of 8th September 1819 (establishing the periods of Presciption for the Kandyan Province) applied to claims for service due in respect of lands, though the material clause of the Ordinance uses the word " lands."

This decision in the Kandyan case was not brought to the notice, of my predecessor when the Colombo case was decided.

Altogether the Supreme Court feels itself at liberty to exercise its own judgment on this question, and this Court agrees in considering, that the words " possession of lands or immoveable

property," as used in the Ordinance of 1834, are ample enough to apply to the enjoyment of right of way. 1860. Nov. 5.

A right of way (or more correctly, speaking a liberty to a right of way) is a prœdial servitude, and *Voet* is decisive as to this being immoveable property. His words *(Com. ad Pand. 1. 8. 20,)* "*Servitutes praediales quod spectat, non dubium quin rerum immobilium numero veniant.*" See also *Vanderlinden's Institutes, bk. 1, ch. 2* and *Story on the Conflict of Laws, pp. 308* and *379*, *Brown's Civil Law and Notes.*

The only difficulty as to this question arises out of the exclusive employment in the Ordinance of the word "possession" in connexion with the words "lands or immoveable property." Strictly speaking, a man cannot be said to be *possessed* of a servitude. Servituti vera possessio non est, see Voet on the Pandects. p. 422. The Roman Jurists, when writing especially on the subject of possession, drew the distinction between the exercise of property over corporeal things, and the user of such an easement as a right of way thereon.

They invented the phrase "*juris quasi possessio,*" when speaking of servitudes.

This is fully explained in the well known treatise on Possession by the great German Jurist Savigny (page 131 of Sir Erskine Perry's translation), and it is most lucidly set forth by Mr. George Long (formerly Professor in University College, London, and Reader in Civil Law to the Inns of Court) in the article on Possession written by him, in Smith's *Dictionary of Greek and Roman Antiquities.* Mr. Long there says, "though things incorporeal are "not strictly objects of possession, yet there is a *juris quasi possessio* of them, as for instance in the case of servitudes *(easements.)* "The exercise of a right of this kind is analogous to the possession "of a corporeal thing, in other words, as real possession consists in "the exercise of ownership, so this kind of possession, which is "fashioned from analogy to the other, consists in the exercise of "*jus in re* or of one of the component parts of ownership. In the "case of possession, it is the thing (corpus) which is possessed, "and not the property; by analogy then, we should not say that the "*servitus* or the *jus in re* is possessed, but as in the case of *jus in re* "there is nothing to which the notion of possession can be attached, "while in the case of ownership there is the thing to which we "apply the notion of possession. We are compelled to resort to "the expression *juris quasi possessio,* by which nothing more is "meant than the exercise of a *jus in re,* which exercise has the "same relation to the *jus in re* that proper possession has to "ownership."

It is to be observed that this phrase *juris quasi possessio,* has not acquired currency and has not been rendered into modern

1860 Nov. 5. — languages, and even in the Roman Writers themselves, this distinctive phraseology was not always preserved.

The words "*possidere,*" "*possessio,*" "*possessor*" may be frequently found in their writings as applicable to servitudes, as Savigny has shewn in his treatise on Possession (p. 131 of Sir Erskine Perry's translation.) So modern Jurists, including Savigny himself, though at times they point out the distinction between the true "*possession*" of corporeal property and the "*juris quasi possessio*" of rights like easements over it, employed in general the words "*possession*" and *possess,*" or their equivalents in the various modern tongues as generally applicable to all such things. Brown's *Civil Law,* Van Leeuwen's *Commentaries* and many other books on Jurisprudence will be found to contain abundant proof of this.

Altogether the Supreme Court has no doubt that the words "*possession of immoveable property*" in the Ordinance may apply to enjoyment of a right of way. There must be actual enjoyment, not mere claim of title or abstract right, and the Supreme Court may define "possession," when applied in legal language to a servitude, such as the *jus itineris,* to be the exercise of a *jus in re,* with the *animus* of using it as your own as of right, not by mere force, not by stealth, and not as a matter of favour, *nec vi, nec clam, nec precario.*

The Supreme Court might also draw no slight argument in favor of holding that the words of the Ordinance extend to servitudes, from the fact that, if the Ordinance were to be construed otherwise, a solemn legislative enactment, which was designed and which *professes in its preamble* to give a comprehensive system of rules of limitation for *all* actions, would fail to include rights of way, many rights to water, rights to light and the numerous other easements which exist, and many of which are of such frequent and such great importance.

It was further objected to the plaintiff's right to maintain this action, that his user of the right of way had been interrupted for the great part of 1857 and 1858, and that consequently he had not had the undisturbed and uninterrupted possession for ten years, previous to the bringing of the action which the Ordinance requires.

The learned counsel for the defendant wished the Supreme Court to read the words "previous to the bringing of the action" as meaning *next* before the bringing of the action,

The Supreme Court thinks that such an interpretation would be erroneous.

The English Statute of Limitations as to right of way and other easements (which was passed in 1832 and which was doubtless present to the framers of our Ordinance in 1834), has an

express clause, enacting, that the periods of limitation mentioned in it shall be the periods next before some suit, wherein the claim shall have been brought in question, and it further expressly enacts that no act shall be deemed an interruption unless acquiesced in for a year. 1860. Nov. 5 —

There is nothing of the kind in our Ordinance.

The Supreme Court thinks the omission was intentional ; and looking to the mass of difficult litigation, and perplexing opinions, which have grown up in the English Courts in respect of that Statute of Prescriptions, the Supreme Court should be disposed to think the omission salutary.

The consequence of the Supreme Court introducing the word "next" into our Ordinance, as this Court was asked to do, would be very serious. Clearly this Court could not take it upon itself to introduce, by implication, a whole clause as to sufficiency of interruption.

The result would be, that not only men who were disturbed in the use of easements, but men who were turned out of lands and houses, would lose all the benefit of prescriptive title, unless they run off to the Court house, and instituted a suit on the very day on which the wrongful act was committed. Nothing is more common in the plaints for ejectment, which we daily read, where the plaintiff claims by prescription, than an allegation that the ouster occurred one or two, or more years (short of ten) ago. Every one of these plaints must be held bad on the face of them if the Ordinance is to be construed as the present defendant desires.

The Supreme Court should pause long before it so revolutionized the administration of justice in one of its most important branches, even if there was anything in the language of the Ordinance which seemed to favor it. But the Ordinance is not so worded ; and the Supreme Court has double cause not to invent law to make mischief.

The fact of the present case seems, that at the beginning of 1857, the plaintiff had acquired a prescriptive right of way over the defendant's land by uninterrupted user for ten years. Nothing has happened since the beginning of 1857 that could deprive him of it.

A right of way undoubtedly may be lost by non-user ; but then the non-user must have continued for ten years, the same length of time during which user may create a right. It would perhaps, on considering the words of our Ordinance, be more accurate to say, not that the owner of the dominant tenement loses his right over the servient tenement by ten years non-user, but that the servient tenement acquires liberty, and its owner gains full exclusive property in it by the lapse of ten years without the servitude being exercised, and without any act being done,

1860. Nov. 5 — from which an acknowledgment of liability to such servitude would be naturally inferred. Neither is there anything in the facts of this case from which a renunciation, or cesser of the right of way, can be inferred.

Our law very wisely and equitably directs, that, where a man, who has a right of way over his neighbour's ground, stands by, and without interruption or remonstrance sees his neighbour build upon the ground, over which the right of way exists, he cannot afterwards make his neighbour pull the new house down and restore the old road (see *Van Leeuwen's Com.* 204, *Voet Com. ad. Pand.* 418). But the fence which the defendant put up in 1857 and 1858 was clearly not a building of any such description; and as the plaintiff is suing for what has been done during the last two years only, the ninth clause of the Ordinance is no bar to his recovering damages.

The judgment for the plaintiff is affirmed.

D. C. Jaffna No. 8178. } *Cander* v. *Sangary* et al.

Intervention. Per Curiam : — That the decree of the 10th day of May 1860 be set aside as respects that part of the judgment which dismisses the Interventions.

With every inclination to support the District Court in its anxiety to put an end to the dilatory proceedings so common in Jaffna, the Supreme Court is still unable to affirm the present nonsuit. The Order of the Court of the 2nd May 1860 allowing the first set of Intervenients a survey of the land, for the purpose of the trial, and the course pursued, when the first Intervention was filed, of allowing the original parties to plead to the same, might reasonably have led the plaintiff to believe, that as the survey had not been completed and there was no pleading on the second Interveution, the case would not be taken up on the day for which it was originally fixed. Assuming such to have been the case, it would be obviously unfair to affirm this judgment and to expose the plaintiff to the expense and delay of another suit.

The Supreme Court observes with regret the dilatory proceedings sanctioned in this case. The action was commenced in August 1855, and had repeatedly come on for trial when on the 29th December 1858 an intervention was filed. The general rule is that an Intervenient should take up a case in the stage in which he enters it, and there was nothing in the particular claim of the Intervenient, in the present instance, to justify an exceptional course of proceeding. But both plaintiff and defendant had to plead to this Intervention, and when they failed to do so, were

proceeded against by rules *nisi* for judgment. All this led to further delays; but to add to them, a second Intervenient was shortly before the trial admitted, and summons ordered to the original parties. 1860. Nov. 5

An Intervenient should never be allowed, as a matter of course, to intervene in a case. He should summarily show his interests in the cause, before he is allowed to intervene. Had this rule been observed in this case, the second intervention would not have been allowed; for he shews no such interest as would justify his interference. As a general rule too, an Intervenient should never be allowed to delay a case;—if he choose to intervene, he must take it up in the stage in which he finds it Lengthy pleadings on interventions should never be allowed.

The law and practice on the subject of Interventions are admirably summed in Mr. *Lorenz's Notes on Civil Practice*, p. 30-33.

27th November.

Present:—CREASY C. J., STERLING, J. and TEMPLE J.

D. C. Colombo No. 26795. } *Thompson* et al v. *Nannytamby*

Promissory note—illegal considera tion—Insolvency—agreement to annul insolvency proceedings and to forbear opposing certificate.

This was an action for the recovery of £1000 and interest, alleged to be due on a promissory note made by the defendant in favour of the plaintiff's.

The main grounds of defence were:—

I. That the consideration for which the note was given had failed, in as much as the arrangement agreed upon, viz, the annulling of one Ponambelam's insolvency had not been carried out, and

II. That the note was void under the insolvency laws, it having been given with intent to persuade plaintiffs, first, to forbear examining the insolvent, and second, to forbear opposing his certificate.

The District Judge found that the motive which actuated defendant in voluntarily taking upon himself his share of the liabilities (viz payment of 10/ in the £) imposed by the arrangement, was the desire to extricate his relative from his difficulties, by stipulating for the annulment of the insolvency proceedings against him; and that the plaintiffs did not succeed in effectually annulling such proceedings.

On the second point, the Judge held as follows:—

"It was objected that the note was given to forbear the insolvent's examination, if not, to forbear opposing his certificate.

1860. Nov. 5 — "The 128th section of the Ordinance enacts that 'any contract 'or security made or given by any insolvent or other person * * for 'securing the payment of any money due by such insolvent at his 'insolvency, as a consideration or with intent to persuade such 'creditor to forbear opposing, or to consent to the allowance of the 'insolvent's, certificate, shall be void.'

"It was contended by the learned counsel for the plaintiffs, not only that the note was not given for either of the purposes alleged, but further that the Ordinance only applied to forbearance to oppose an insolvent's certificate, and not to forbearance of examination. And in support of this position, he strongly relied upon the case of *Taylor* v. *Wilson*, 5 Exch. Rep. 251.

"On the other side, the case of *Nerot* and *Wallace*, 3 Term Rep. 17, was cited as establishing the proposition that 'forbearing examination' equally fell within the prohibition of the Insolvency Laws.

"The case of *Taylor* v. *Wilson* seems to me to decide no more to than what the Chief Baron carefully limited himself to. '*Possibly*,' says that Judge, '*the question as to the nature of the arrangement 'might have been left to the Jury* ; but we find that the *point reserv- 'ed* was to enter a verdict for the defendant, if the fact of the bill 'having been given to forbear opposition to the last examination was 'within the act of Parliament. We are of opinion that it is not.' It should also be remarked that the plaintiff was the *indorsee* of the bill, and in the statement of the case the reporter expressly notices, 'there was no evidence that the plaintiff was not an innocent *indorsee*.'

"And as in *Birch v. Jervis*, 3 C. & P. 379, I find it was held by Lord Tenterden under 6 Geo. 4 c. 16 s.125, 'that a bill given to 'a creditor to induce him to sign a bankrupt's certificate, is void, 'in whosoever hands it may be, but a bill given to a creditor to 'keep him from *taking steps to oppose* the certificate would be good 'in the hands of *a holder for value without notice*. The section of the above statute, it will be observed, is not quite similar to the corresponding clause in the present Act, the words in the former being 'to consent to or sign such certificate.'

"The case however of *Nerot* v. *Wallace* is peculiarly applicable, and it was there determined (the Act- Geo- 2 chap 30, containing a section No. 11, in substance similar to our 128th clause) that 'a promise made by a friend of a bankrupt that, in consideration 'that the assignees and commissioners would forbear to examine 'him, he would pay a certain sum, is void, as being against the 'policy of the bankrupt laws.

"'The examination of the bankrupt on oath is a security 'which the legislature has given for the benefit of the creditors, 'and therefore even if the commissioners had joined in the agree- 'ment, that would not have bound the creditors.

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"And again, 'even if such consent of the creditors had appear 'ed, they could not have stopped the examination of the bankrupt, 'because the public as well as the creditors have a right to know 'how the bankrupt has disposed of his property. The creditors 'are only interested as far as respects the payment of their debts, 'but the public are interested in knowing whether the bankrupt 'ought to be restored to his former credit by obtaining his certifi- 'cate. It has been contended that the creditors are not injured 'by the agreement; but it is a detriment to the public, which is a 'matter of great importance.'

"On these grounds, I am further of opinion that the defendant is entitled to judgment on the second point, the agreement and note being void, as contrary to the policy of the insolvent laws."

On appeal, *Rust* appeared for appellants and *Dias* for defendant respondent.

The following is the judgment of the Supreme Court:—

This is an action by the payees against the maker of a promissory note, for one thousand pounds (£1000) payable at twelve months, which bears date on the 30 July 1858.

The plaintiffs in this case were assignees of one Ponambalam, who was adjudicated an insolvent, according to the Ordinance, on the 31st March 1858. He did not dispute the validity of adjudication. A great number of creditors proved their debts, assignees were chosen, and a day for the insolvent's examination regularly appointed. The assignees had reason to believe, and did believe, that Ponambalam had fraudulently disposed of much of his property. They intended to examine him as to this; and for the purpose of making the investigation more effective, they had caused several members of his family to be summoned for the purpose of being examined before the Insolvent Court. Thus far the assignees had acted in the strict line of official duty, and according to the true spirit, and policy of the Insolvency laws, which require the assignees to be prompt and vigorous in securing and recovering all the available estate of the insolvent, and in causing the assets to be expeditiously and equitably distributed among all the creditors that have proved.

The intention of the assignees to examine the insolvent, and the members of his family as to his disposal of his property was well known, and caused the greatest alarm to the insolvent and his friends. That alarm must have been evident to the assignees, and ought to have made them still more vigilant and determined in the performance of their duty. But when the examination was coming on, the defendant and other friends of the insolvent made an arrangement with the assignees, by which the examination was stopped; and part of which arrangement was the giving, by the

1860. Nov. 5. — defendant to the assignees, of this promissory note. The defendant now resists payment on the grounds, *first*, that the note was given for an illegal consideration ; *secondly*, that it was given for a consideration that has failed. If he sustain either of these defences, he is entitled to judgment. The District Court has found in his favor in both points, and as the Supreme Court is clearly of opinion, that this arrangement, in furtherance of which this note was given, was an illegal arrangement, and contrary to the true policy and spirit of the Insolvent laws, for reasons which will be presently set forth, that judgment for the defendant will be affirmed.

The complicated facts, and contradictory evidence of this case, are carefully sifted, and fully set forth in the judgment of the Court below; and the District Judge in the same judgment cites and comments on several leading cases on the subject, to which may be added the cases of *Hall* v. *Dyson*, 21 L. J. Q. B. 224 and *Staines* v. *Wainwright*, 6 Bing. New Cases, 174.

The Supreme Court need not in this judgment enter into the evidence further than to advert to some of the broad facts, which are either admitted on both sides, or which, though nominally disputed, are too clear to admit of any reasonable doubts. And the Supreme Court premises that, in trying to learn the true nature of the transaction, as part of which, the promissory note was given, the Supreme Court does not look so much to the formal agreement which was subsequently drawn up, as to the writings which passed at the time, and the parol evidence of what *then* took place between the parties.

When the insolvent's friends succeeded in stopping the dreaded examination, they offered a compensation of ten shillings in the pound. The note now sued on was one of the securities for the payment of that compensation. So far all the witnesses agree. In return for this ten shillings in the pound, there was to be a stop to the insolvency proceedings, and an attempt, at least, to annul the adjudication, and all that had already taken place under it. The Supreme Court uses the words " attempt at least," because there is a dispute between the witnesses whether the undertaking on the part of the assignees did or did not go further. The defendants say that the assignees undertook to procure a legal and effectual annulment of the insolvency ; and one of his defences to this action is that they have either omitted or failed to do so. The plaintiffs contend that they only undertook to do all in their power towards annulling the insolvency ; and that they had done all in their power for that purpose. And it appears that on the 17th of August, after the note was given, a motion paper signed by the assignees, the insolvent and many creditors, was laid before the insolvent Court on which the order, purporting to annul and sus-

pend the insolvency proceedings was obtained. That order has already been brought before the notice of the Supreme Court, in another case, arising out of Ponnambalam's affairs ; and the Judges, who then sat here, called it an order "on the face of it contrary to the proceedings of the Insolvency Ordinance." The Supreme Court quite agrees with them ; but it is needless to discuss now the worth, or worthlessness, of that order, or whether it is all that the assignees undertook to procure For it is clear to the Supreme Court, that the plaintiffs on their own shewing, when they made the arrangement with the Insolvent's friends, violated their duty as assignees ; and that they cannot recover this note, which was one of the inducements to that misconduct. 1860. Nov. 5

The Supreme Court does not base its judgments merely on the indisputable fact that one element of the arrangement between the parties (and present to the miuds of all parties,) was understanding that the examination which might have led to his undergoing the inconvenience and the ignominy which the insolvent laws ordain for fraudulent debtors, might also have led to the recovery by the assignees of property available for the benefit of the general body of creditors. The Supreme Court would decide the case against the assignees were no facts against them clear, besides the undeniable fact, that the assignees and the insolvent and his friends, knew perfectly well, when they made this arrangement, that it had not the sanction of all the creditors. Every one of the parties in this arrangement was aware of this, and every one also knew that it was hopeless to try to annul the insolvency, in accordance with the 140th and 141st sections of the Ordinance, although the substance of proceedings under the Ordinance, was adopted in the motion paper for the Insolvency Court, which was drawn up before this note was given, but not used till some time afterwards.

Here, then, the Supreme Court finds assignees who were appointed, as all assignees are, to carry on the insolvency proceedings for the benefit of all the creditors, agreeing to stop at least, and to try at least, to annul those proceedings against the known wishes of some of their constituents and *cestuis que trusts.* Such conduct is legally indefensible, and no Court ought to uphold a security whereby such conduct was procured.

In saying this, the Supreme Court does not mean to impute any moral guilt to the assignees. They may, probably, have thought that in getting the ten shillings in the pound they were doing a good thing for the mass of the creditors, and that the arrangement would not be binding on such creditors as disliked it. Thus the Supreme Court finds the second plaintiff on his first examination saying : "This agreement was entered into on the un-
" derstanding that the insolvency of Ponambelam, should be quashed,

1860. Nov. 5 — "so far as regards the creditors who were parties to it," and Mr. *Martensz*, the Proctor for the Assignees, says in this evidence that "there was a general understanding that the agreement would be "binding on the parties who joined, but not on others." But it ought to have been remembered that the non-joining creditors must necessarily be prejudiced by the arrangement, though it might not be legally binding on them. The insolvency proceedings, under which they had proved, had taken away from them for a long time, at least, the opportunity of suing Ponambelam and trying to obtain payment of their debts from him. They had each and all of them a perfect right to exercise an independent judgment, whether ten shillings in the pound was a sufficient composition, or whether any composition at all ought to be accepted in such a case. The minority could not be bound by the opinion of the majority, unless in a meeting convened according to the 140th section of the Ordinance, which requires that the bankrupt should first have been examined, so that the whole truth of the case should have been made known, which requires long notice, ample time for consideration, and a majority of not less than nine-tenths. It would have been mere mockery to tell the non-joining creditors to go on with the insolvency proceedings, after the assignees had abandoned them ; nor could they have been fairly called on to take on themselves the trouble and expenses of an application to this Court to set aside the superseding order of the Insolvent Court, or of application to the Insolvent Court to appoint fresh assignees or make the old ones do their duty. In any event *Ponambelam* had gained time for more effectually concealing the fraudulent transfers of property of which he had evidently been guilty, and for making it difficult or imposible to trace and recover that property. The whole arrangement was an attempt to evade the letter of the law, and to defy the spirit of the law, and the law refuses to uphold it.

The Supreme Court gives no opinion, here, whether even with the consent of all the creditors, an Insolvency can be suspended after adjudication, in any other way than by proceeding accordin to the 140th section. The Supreme Court is quite clear that, without such unanimous consent, a private arrangement to annul the insolvency is invalid and illegal, and has no hesitation, in this case, in affirming the judgment against the assignees.

1861.

19th June.

Present :—CREASY, C. J., TEMPLE, J., and THOMSON, J.

C. R. Chavakachcheri, No. 961. } *Valayudan* et al v. *Sidemberam* et al.

The judgment of the Court was as follows:—

This was an action brought by the plaintiffs to recover possession of certain land. The defendants in their answer said they had no claim upou the land and also denied occupation. The present appellants, at the same sitting at which the defendant's answer was taken, intervened, and in their petition of intervention they claimed the land through their mother, under an ancient transfer deed and also by prescription. At a subsequent sitting of the Court, they filed this deed and a list of their witnesses. The case was several times fixed for trial but adjourned for various causes, but never through any default of the intervenients, who appear to have been ready with their witnesses upon every occasion. At last comes the following entry by the commissioner of the proceedings of the 6th March:—"Defendants absent, plaintiffs say "they waive objection and costs. As defendants say they have no "claim and are absent to-day, intervenient is therefore withdrawn "from this case, since the case between original parties is at an end. "Judgment for plaintiff to be quieted in possession. This judgment "not to affect intervenients, who can bring a case of their own." Intervention.

As the intervenients did not withdraw voluntarily, they appeal against the judgment and insist on their right to contest the plaintiff's claim and to have their title considered in the present case.

The Supreme Court is of opinion that this appeal is well founded and the judgment of the Court below in favour of the plaintiff is accordingly set aside. "The principle of the law of "intervention is, that if any third person considers that his interest "will be affected by a cause which is depending, he is not bound to "leave the case of his interest to either of the litigants, but has "a right to intervene or be made a party to the cause, and take on "himself the defence of his own right, provided he does not disturb "the order of the proceedings." This enunciation of the principle of intervention is part of the judgment in the well known case of

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the *President and Members of the Orphan Board* v. *VanReemen and another*, (1 Knapp's Privy Council Reports p. 91.)

It would be idle to allow an intervenient to come in to defend his own rights, and then to suffer him to be put out of Court by the renunciations and disclaimers (possibly collusive) of the original parties. There is indeed express authority that this ought not be done. See the *Libri Practicarum Observationum Andreæ Gaili, p 125, " Renuncio Principalis non nocet Intervenienti."*

We may also usefully refer here to a former decision of this Court, cited in Morgan's Dig. p. 59. The Supreme Court there rightly states a main reason why the ample power of intervention is allowed by the Civil Law. It is done " in order to avoid multiplicity of suits." But the course which the Court of Requests in this case has taken by directing the plaintiff to be put in possession of the disputed property, and telling the intervenients that they may begin another action, is a plain multiplication of suits and it, places all the intervenients at manifest disadvantage. The judgment is set aside.

6th August.

Present :—Temple, J.

In re *Aysa Natchia* and others.

Mohamedan Law—custody of children.

The Fiscal for the Western Province returns the writ of Habeas Corpus, issued in the above case, as served.

Mr. Advocate Lorenz appears for Ahamado Lebbe and Umma Natchia, and contends that according to the Mohamedan Law (Hedaya B. 4. C. 13.), the maternal grand mother is entitled to the care of the children in preference to their father, and quotes a decision of the Supreme Court dated 14th June, 1843.

The Supreme Court declines to interfere on behalf of Aysa Natchia.

20th August.

Present :—Temple J. and Thomson J.

P. C. Kaigalle, No. 6546. } *Kolende Markar* v. *Hendrick* et al.

The judgment of the Court was as follows :—

Frivolous or vexatious arrest—Ordinance No. 15

This is a charge for frivolously or vexatiously arresting the prosecutor and detaining him in custody for three days, without sufficient cause, on the 29th, 30th and 31st of May, 1861, in

The clause enacts " that every peace officer, or officer of the " law and every private person frivolously or vexatiously arrest- " ing any person, shall, over and above his liability to any action " for false imprisonment or other liability, be guilty of an offence " and be subject on conviction thereof to such punishment by fine " or imprisonment with or without hard labour, as the Court before " which such conviction shall be obtained shall think proper to " award."

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of 1843, cl. 20 [Ordinance No. 11 of 1868, cl. 167]

The Court is of opinion that the judgment of the Court below ought to be reversed on two grounds:—

(1). That the arrest was not in law a frivolous or vexatious arrest;

(2). That the defendants were acting ministerially only, and are not liable for the arrest.

A frivolous or vexatious arrest can only be an arrest malicious in its nature, or without substantial ground of suspicion, or upon a charge plainly not an offence in law. In this case, a principal officer of Police received information that the complainant had purchased a bag of rice from a carter, into whose hand it had been given with other goods to convey to Kandy. It is said that the complainant acted in a straightforward manner and in open day, and that he gave a good price for the goods, also that the carter had a good reason for selling the rice. Much, however, of this was the result of subsequent enquiry. The Court is of opinion that the Inspector had, on the facts as related to him, a good ground of suspicion that the complainant had been guilty of receiving stolen goods, and that not only was he entitled, but that it was his duty, to order the arrest of the complainant. The arrest was not, therefore, in the first instance vexatious and frivolous. The Inspector may be liable for not bringing the complainant before a magistrate, but that is not the charge in this case, nor is the Inspector himself charged in this case at all.

In the second place, the defendants were acting under the the orders of the Inspector, orders which they had every reason to believe to be lawful, and as they are required by law to obey all orders of their superior that they do not know to be unlawful, they *are not* liable for such an arrest as this ordered by a superior officer. If the Police were guilty of any excess in effecting the arrest, that should be made the substance of a separate charge of assault.

In the last place, the Police are protected in the execution of their duty by the 19th. cl. of Ord. No. 17 of 1844, which enjoins to apprehend any person they may have reasonable cause to suspect having committed any crime; in this respect, the Court is of opinion the Police did their duty.

1861. Aug. 27. —

27th August.

Present:—TEMPLE, J., and THOMSON, J.

P. C. Colombo, No. 59202. } *Menchy Hamy* v. *Hendappoo.*

Maintenance—illegitimate children—married woman—presumption of legitimacy—evidence.

This case was remanded for a new trial in these terms:—

This is a complaint against the defendant for not supporting his three illegitimate children. On certain admissions of the complainant, the Court below has dismissed the case without hearing her evidence. The admissions made by complainant are that she has a husband living at Mutwal, and that she has been living separately from him for some time. On the face of these admissions, the Court below has decided that as the complainant's lawful husband is living within easy access, he is liable for the support of the complainant's children, as there has been no legal separation.

This Court is of opinion that this judgment ought to be set aside. The doctrine enunciated by the Court below may be said to be the law, but it is not the whole law. The law in certain cases recognises a conclusive presumption in favour of *legitimacy* Where the husband and wife have cohabited together, and no impotency is proved, the issue is conclusively presumed to be legitimate, though the wife is shewn to have been at the same time guilty of infidelity; and even where the parents are living separate, a presumption of legitimacy arises so strong that it can only be rebutted either by proof of previous divorce, or by cogent and almost irresistible proof of non-access in a sexual sense. Nor is the fact that a woman is living in notorious adultery in itself sufficient to repel this presumption. By the very form of the proceedings in this case, it is clear that the Police Magistrate, after having vivâ voce examined the complainant, came to a judgment without further hearing the case. There is nothing to shew that the complainant was called upon to prove her case; even the very process by which the admissions were obtained is not entered upon the proceedings.

This then is not a case in which the Court thinks that any affidavit of neglect of evidence is necessary to induce it to order a new trial; the proceedings themselves shew that the complainant was not called upon for evidence. Until the complainant's evidence is heard, how can any Court say that she had not "cogent and irresistible proof of non-access to her husband." The judgment is therefore set aside, and a new trial ordered, with directions to the Court below to hear the complainant's case in full. At the same time the Court below is directed that all evidence of the parents as to whether they have or have not connexion must be rejected: not only all direct questions respecting access, but all questions which

have a tendency to prove or disprove that fact, unless they are put with a view to some different point in the cause; although there appears to be no objection to this woman confessing her adulterous connexion *after* the fact of her husband's non-access has been already proved by independent evidence, and thus enable the Magistrate, in the event of her evidence being corroborated in some material particulars, to make the proper order. This exception to the general rule of exclusion enunciated above is founded on necessity.

1861. Oct. 1.

24th September.

Persent:—THOMSON, J.

P. C, Kandy No. 51079. } *Woutersz* v. *Andris.*

Sale of arrack without license—evidence of permission.

The conviction and sentence were set aside in these terms:—

The accused was convicted of permitting arrack to be sold in his house without a license. It was proved that arrack was sold in the accused's house by his son in the absence of the father. The evidence carries the case no farther. This is not legal evidence of permission; for this Court or the Court below cannot say that the arrack may not have seen sold without the wish, or even in fraud of the father. Some further evidence of the connection of the father with the sale is necessary to a legal conviction. It would be a very dangerous doctrine to hold a man liable simply because an evil deed is done in his house by a relative, although it may be a ground of suspicion.

1st. October.

Present :—CREASY, C. J., and THOMSON, J.

P. C. Chavakachcheri, No. 19860. } *Saravanamuttu* v. *Cartegasen* et al.

Granting of postponement.

This was an appeal preferred by the complainant against an order of the court below directing the case to be struck off, as the complainant was not ready to go on with it and assigned no reason for being unprepared.

The Supreme Court dismissed the appeal, and observed *inter alia* as follows:—

If Police Magistrates would shew more firmness in refusing applications for adjournment, except in very special instan-

1860. Oct. 8. — ces and when the interests of justice evidently require more time to be allowed, the business of their courts would not fall so heavily in arrear as now is frequently the case, and the proceedings before them would better deserve the title of summary, a title which, at present, we can hardly give the long lists of repeated postponements, which we find so largely recorded in the books of Police Courts, which it is one of our circuit duties to inspect.

8th October.

Present:—CREASY, C. J., and THOMSON, J.

C. R. Harrispattu 2545. } *Alwis* v. *Young*.

Practice—judgment by default—power of Court to re-open—order not appealable.

In this case the Supreme Court rejected the appeal in these terms:—

In this appeal, the plaintiff complains of an order of the Commissioner whereby the defendant, against whom judgment by default has passed for a second time, has for the second time been let in to defend.

It is urged by plaintiff that there is no power to re-open judgment by default a second time. We do not agree in that view; but certainly such an indulgence ought never to be granted on such an unsatisfactory affidavit as was used in the present case. The defendant's Proctor says in it that he himself was prevented by illness from attending the Court, and that it was impossible for him to warn his client. He does not shew why or how it was impossible to do so; nor does he shew why he could not have obtained the aid of some other Proctor to act for him, at least to the extent of requesting an adjournment.

This suit was instituted on the 27th April 1860. It was prolonged till the 20th September by a string of adjournments, none of which appear to have been caused by any neglect or default of the plaintiff. On the 20th September the plaintiff obtained judgment by default for the first time. Defendant applied on the 30th of November to open that judgment, and on the 27th of February in this year the commissioner decided that the judgment should be opened, and the 9th of April was fixed for the hearing. Defendant on the 23rd March filed his answer, but on the 9th of April neither he nor his Proctor were present, and the plaintiff had judgment by default for the second time. On the 29th of May the defendant's Proctor files an affidavit of excuse, and on the 27th of June the defendant furnishes a stamp for

notice to plaintiff to shew cause why judgment should not be re-opened. The Court appoints July the 24th for hearing this matter, and on that day decides to re-open the judgment a second time, examines the parties, and then further postpones the case for the plaintiff to get up his witnesses. 1861. Oct. 10.

It is not to be wondered at that the plaintiff should feel aggrieved at these *fifteen* months of the law's delay in a claim for £ 5. 10 0. But we are of opinion that we cannot entertain his present appeal against the order of July 24th. The Court of Requests Ordinance gives an appeal "to any party who shall be dissatisfied with any final judgment or order having the effect of a final judgment" But the order of the Commissioner to re-open the judgment by default is not a final judgment, or an order having the effect of a final judgment, as against the plaintiff, who, when the case proceeds, may, for aught we know, be the successful party. It is true that the following Ordinance as to Rules of Practice speaks of appeals against any judgment or order of the Court of Requests; but we must interpret these words of the principal Ordinance, expecially as the second Ordinance distinctly purports to provide "Rules of Practice for regulating the jurisdiction in the Courts of Requests," and it does not profess to do anything more.

We do not, however, wish it to be understood that the present plaintiff, if the final judgment of the Court of Requests should be against him with costs, will not have the power of appealing against that judgment and of bringing in that appeal before the effective notice of the Supreme Court any errors of law or in fact committed by the Commissioner in any part of the action (see the latter part of the 19th cl. of the Court of Requests Ordinance); and we wish at once to express our regret at observing such dilatory proceedings in Courts, which ought to be Courts of summary justice.

If Commissioners would be more strict in refusing applications for adjournment and for re-opening cases, except on very strong and on very stringent conditions as to payment of the costs occasioned by delay, the burden of work on themselves would be much lighter, and justice would be administered in a manner much more satisfactory for the interests of honest suitors.

10th October

Present:—Creasy, C. J., Temple J., and Thomson, J.

C. R. Kagalle No. 1047. } *Sinho Appu* v. *Ookuwa.*

In the following judgment of the Supreme Court, which sufficiently sets out the facts of the case, the judgment appealed Sale of land —warranty

1861. Oct. 29.

of title—eviction—claim for value and compensation for improvement.

against was modified by it being decreed that plaintiff do recover a further sum of £ 4 with costs of appeal:—

In this case the plaintiff in 1857 purchased from the defendant a piece of land, the deed containing a warranty of title; and having entered into possession, he built a house in the land. Subsequently the land was sold by the crown at a public sale to a third party, who is in possession.

The plaintiff sues his vendor for the purchase money and the value of the house which he had built, and has obtained judgment with costs for the purchase money £ 2, but not for the value of the house.

He appeals on the ground that he should also have judgment for the value of the house, in view of the Roman Dutch Law, that "he who has built on another's land, of which he was in possession bona fide, may on losing possession recover the useful expenses" (see Grotius b. 2, c. 10, s. 8, p. 108., and Vander Keessel b. 2, c. 10, s. 8, p. 67.)

The Supreme Court considers that plaintiff ought to recover the value of the house, it being only such an one, as, and not more expensive than, might fairly have been expected by the vendor to have been built on the land.

Defendant's evidence proves the house to be worth four pounds.

29th October.

Present :—Creasy C. J., Temple, J., and Thomson, J.

D. C. Colombo, No. 26414. } *Corey* v. *Fernando*, et al.

Husband and wife—liability of wife's share of common property on obligation of husband arising out of delict amounting to crime.

The following judgment of *Morgan*, D. J., sets out the facts of the case:—

" George Felsinger and three others were tried for theft in the Supreme Court and found guilty. The complainant subsequently brought a civil case, No. 26414, in this Court, and obtained judgment against Felsinger and the three others, jointly and severally, for £ 200 and costs.

"Execution having been issued, three gardens with the buildings thereon, situate at Colpetty, were seized as the property of Felsinger, and advertised for sale.

"His wife now moves for an order to exclude her half share of the properties, and to declare the same free from liability.

"Having heard counsel, *pro* and *con*, and having duly considered the authorities cited by them viz., Grotius' *Introd.* 1. 5. 22, Lorenz's *Van der Keessel*, p. 24, Rodenburg, 308, Van Leeuwen's

Commentaries, 525, Lœnius' *Decisions*, 103, and A. Wesel *de dam. inter conjug.*, 59, it appears to me that she is entitled to such an order. It is clearly laid down in these authorities that a wife's property is not liable for the husband's delicts, but that her half should be reserved to her. Some writers (Voet *ad Pand.* 23. 2. 56) draw a distinction between the higher and the lighter penalties. "But such an opinion," says Vander Keesel in his *dictata* (*Praelect ad Grotii Introduc.* lib. 1. pt. 5. § 22), "cannot in any manner be supported. I am quite of opinion with Rodenburg and others that whatever the husband has to pay *ex delicto*, whether the cause be a civil or a criminal one, should be paid wholly out of his half either of the common property or of the common profits, and that the wife is not bound to contribute any portion thereof. Motion allowed. Costs divided." 1861. Oct. 29. —

On appeal preferred by the plaintiff, the Supreme Court delivered its judgment as follows :—

The facts of this case make it necessary for us to determine this question :—Is the wife's share of the common property of husband and wife liable, in a civil action against the husband, for the husband's obligation arising out of delict amounting to crime?

We are of opinion, for the reasons we are about to set forth, that the wife's share is not so liable, and we shall affirm the judgment of the District Court in her favour accordingly.

The point is one of great practical importance, but no decision of our own Courts, or of the Dutch Courts, on it is to be found.

The dicta of the text-books are, with one exception, not very clear, and it has been necessary to examine clearly the whole of the greater part of several treatises that have been cited, in order to judge what effect is to be given to particular expressions of the writers.

The dispute between the parties was thus far narrowed down : It was admitted on all hands that the wife's share of the common property is liable for all contracts made by the husband. It was equally admitted on all hands that, when there is a criminal prosecution against the husband and he is to be punished by the sentence of confiscation or fine, the wife's share is not liable to be seized under the criminal judgment against him.

A distinction which some of the Dutch jurists had endeavoured to make between lighter and more atrocious crimes in this respect, but which had been repudiated by other and later authorities, was very properly not attempted to be set up here.

The contention for the appellant (the judgment creditor) was that, although in a criminal prosecution against the husband the wife's share is not liable, it is always liable in a civil action against him, whether on obligation arising out of contract or on obligation arising out of delict of any kind.

1861. Oct. 29. — The contention for the respondent was that the distinction as to the liability or non-liability of the wife's share is created, not by the form of procedure against the husband, but by the nature of the act, that made the husband liable ; that the husband who is perpetual guardian of the wife and sole manager of the joint property binds her share in the property by all his contracts, but that when he commits a delict, the consequent liability affects him and his share of the property only.

We were referred to Grotius, Van Leeuwen, Wesel, Groenewegen, Rodenburg, Loenius and Vanderkeesel. The general effect of the writings of Grotius, Van Leeuwen, Wesel, Groenewegen and Rodenburg may be stated thus : they all lay down on broad and unequivocal terms that the husband's contracts bind the wife's share of the property. They then cite cases and give reasons which establish the non-liability of the wife's share in respect of fines or confiscations imposed on the husband in criminal prosecutions against him, but they do not expressly deal with the precise point raised here : *is the wife's share liable in a civil action, not a criminal prosecution, for delict amounting to crime?*

Particular passages may be culled here and there from their writings which, if they stood alone as their maxims on the subject, might seem to determine it ; but when taken with reference to their contents, they cannot be thought thus decisive. But on the whole, the effect of their writings is to make us think that these jurists would not have held the wife's share liable in such a case as the present. It is to be remembered that the wife's liability for the husband in any way and to any extent is exceptional to the Roman Law; and the Dutch jurists always regarded the Roman Law as giving general rule in cases where the local Dutch Law was silent or doubtful. We think that those writers took care to point out the liability of the wife for the husband's contracts as an established deviation from the Roman Law; that they there drew attention to the criminal cases, where it had been attempted in vain to involve the wife's share of the property in the consequences of a confiscation or penalty decreed against the husband ; but that if the present question, the liability of the wife's share in an action for the husband's delict amounting to crime, had arisen, they would have followed the principle of the Roman Law, which is in favour of the wife, in a case where the local laws were not clearly to the contrary. (See *VanLeeuwen*, pt. 2, p. 525 and Gail, *Pract. Obser.*, 494).

A case indeed was cited to us on behalf of the respondent as deciding the non-liability of the wife for the husband's crime : it is in *Loenius*, p. 670 : but on examination of it, it does not seem to us to go beyond the criminal cases cited in Groenewegen and others. It appears to have been a prosecution of the husband for homicide,

in which the husband obtained a pardon to pay a sum of money to the relations of the slain man. 1861. Oct. 29.

VanLeeuwen (*Censura Forensis* i. 1. 22), in dealing with the wife's liability, specifies cases of criminal prosecutions only, but he gives a reason for the wife's non-liability to the Treasury in a criminal prosecution, which would make her also not liable to a plaintiff in a civil action for the husband's crime. He says, "the "wife and husband enter into no partnership in crime, and there-"fore neither party is bound by the misfortune of crime committed "by another." It is proper however to observe that other writers repudiate the idea of the wife's liability depending on any relation of partnership. But there is one explicit authority on the subject, and a very high one : Vanderkeesel, who is clearly in the wife's favour. He states the question broadly : "What is the law when "the husband has been condemned in a pecuniary penalty, either "criminal or civil, by means of a delict ?" (*Si ex causa delicti in mulctam pecuniariam sive criminalem sive civilem fuerit condemnatus*). He reasons the matter very fully and decides emphatically in the wife's favour : *Quicquid ex delicto solvit maritus, sive causa sit criminalis sive civilis, illud ex ejus semisse vel bonorum communium vel communis lucri solvendum esse nec quicquam uxorem conferre tenui.*

On the whole, we think that the weight of Dutch authorities, the general controlling influence of Roman Law, and the reason of the thing, concur in bringing us to decide that the wife's share of the common property is not bound, in either civil or criminal proceedings, by the husband's obligation arising out of delict amounting to crime.

It will be observed that in giving judgment, we do not go to the full length of deciding that there is no kind of delict which, if committed by the husband, will create an obligation affecting the wife. Cases may arise where the husband, in the bona fide management of the common property, may incur obligations *ex delicto* without any criminal or morally wrong conduct. The plaintiff in an action on such delict might urge arguments for his claim on the wife's share which would be inapplicable here. We express no opinion on such cases one way or the other ; but we have no doubt that on the proceedings now before us, our proper course is to decide in the wife's favour, and to affirm the order of the District Court.

Affirmed.

1861. Oct. 29.

P. C. Galle, No. 41172 } *Rajapakse* v. *Angerisa* et al.

False or frivolous prosecution —[Ordinance No. 11 of 1868, cl. 106]—knowledge of falsity—mode of adjudication

The facts of this case are sufficiently indicated in the following judgment of the Court :—

In this case the complainant charged the defendant with stealing his fence sticks. He states before the magistrate that he made the charge on what had been told him ; and he produced two witnesses each of whom deposed to having seen the defendant take the sticks, and the first of whom stated that he told the plaintiff of what he saw. These witnesses contradicted each other on some material points, and the final entry in the note of proceedings is : "Case dismissed. Complaint is fined £1 for bringing a false case."

The complainant appeals against this fine, and we think his appeal must be allowed. The 12th cl. of Ordinance 11 of 1843 gives power to a Police Court to fine a prosecutor, "whenever it shall appear that any prosecution has been instituted therein on false, frivolous or vexatious grounds." But in order to justify under this section a fine for a false charge, it should appear not only that the charge, when investigated, proved to be erroneous, but that it was false to the prosecutor's knowledge at the time when he instituted the proceedings : there is no proof whatever here that such was the case.

The present appellant may have been told by the witnesses that they had seen defendant steal the sticks ; he may have believed them, and he may have, in perfect honesty and without any malice, instituted the charge on the faith of their statements, though their evidence afterwards was unsatisfactory in the magistrate's judgment, with which in this respect we do not interfere.

The Supreme Court wishes also Police Magistrates to bear in mind when they fine prosecutors, under the 12 section of Ordinance No. 11 of 1843, (and such fines are often well deserved and the infliction of them is often very salutary), there ought to be an *express adjudication* on the face of the proceedings, that the prosecution was instituted on false, frivolous or vexatious grounds, as the case may be.

P. C. Kaigalle, No. 16940. } *Fernando* v. *Fernando* et al.

Arrack, Ordinance No. 10 of 1844, cl. 32—innocent and

The following judgment of the Court sets out the facts of the case :—

The defendant in this case was charged under Ordinance No. 10 of 1844 with possessing $7\frac{1}{2}$ gallons of arrack without a license.

1861. Oct. 29. — unconscious possession.

The defendant, in answer to the charge, admitted that a basket containing several bottles of arrack was found in his dwelling house, but asserted that the basket had been left there by a cartman, who said that a person whom he named would call for it next day ; and defendant further asserted that he, defendant, was ignorant of its contents.

There was some slight conflict of evidence, and ultimately the magistrate, as appears by the minute of proceedings, feeling a doubt as to the truth of the matter, gave the defendant the benefit of the doubt and acquitted him.

We have no authority to review the magistrate's decision so far as regards the facts ; but it is maintained before us in appeal, that even supposing the facts to have been as asserted by the defendant, he ought to have been convicted ; and we are referred to the words of the Ordinance which enact that "the possession by "any person of any spirit distilled from the produce of the "cocoanut or other discription of palm or of the sugar cane shall be "unlawful," except under certain specified circumstances, none of which existed or were pretended to exist in the present case.

Our attention was also properly drawn to the last part of the clause, which says that "any person possessing any such spirit "under any circumstances, not specified in some one or more of the "abovementioned exceptions, shall be guilty of an offence and "liable &c."

It is argued before us that these strong words make the mere physical possession of the article enough for a conviction, though there may not be the *mens rea*, or even the *mens conscia*, in the possession.

We think that it is not so, and that in applying the penal clause of this Ordinance, we must bear in mind the general maxim *actus non facit reum, nisi mens sit rea*, or as it is expressed by VanLeeuwen, p. 453, "crime considered in general is all punishable "transgression of the law, *wilfully and from an evil mind*, which is "very narrowly considered : so that where no public fraud or evil "intention is mixed with the deed, it cannot be punished as a crime."

The words of the Ordinance are certainly very strong, but they are scarcely stronger than the words of the English Game laws, which enacted (*inter alia*) that no person should upon any pretence whatever have in his possession any partridges between the 1st of February and 1st of September. But when a qualified person had in his possession, on the 9th February, partridges which had been killed and possessed by him before the 1st, he was held by the Court of King's Bench in *Simpson* v. *Unwin*, 3 B. & Ad. 134, not to be liable to the statutory penalty, because, though the case was within the literal meaning of the statute, it could not be considered to be within its purview without absurdity, and *Patteson, J.* gave his opinion that "the possession meant by the Act was an unlawful,

1861. Oct. 29. — "not an innocent possession." So in *Warneford* v. *Kendall*, 10 East 19, it was ruled that the possession of game by a servant, employed to detect poachers, who took it up after it had been killed by strangers on the manor, in order to carry it to the lord, is not a "possession" within the penalty of the Game Laws, 9 Anne, c. 25 s. 2 and 5 Ann. c. 14. Lord *Ellenborough* there reasons on the absurdity of a literal construction and says: "if this be an offence, no "case can be stated in which an unqualified person can innocently "come in contact with game."

We certainly disclaim the almost unbounded latitude in construing penal statutes which courts in former times have assumed; and we take as our general rule for the interpretation of all Ordinances that which has often been laid down by the English Judges of late years, but which is most clearly stated by the present Lord *Wensleydale*, when Baron *Parke* in *Perry* v. *Skinner*, 2 M. and W. 471: "The rule by which we are to be "guided is to look at the precise words and to construe them in "their ordinary sense, unless it would lead to any absurdity or "manifest injustice, and if it should, so to modify and vary them "as to avoid *that* which certainly would not have been the inten-"tion of the Legislature. We must put a reasonable construction "on their words."

But if we were to read this Ordinance in the literal sense contended for by the appellant, and hold that the mere physical possession of the contraband article is punishable, though there was neither the "mens rea" nor "mens conscia," we must hold that the man is criminally punishable, who, as an act of kindness to a neighbour, takes into his temporary possession a parcel, the contents of which he does not know, but which when searched is found to contain arrack. Or if a spiteful person were, by any lie or trick, to cause another to take innocently into his possession a large package of rice in which the arrack bottles were carefully concealed, and then were to get a search warrant and have the arrack discovered on the defendant's premises, the Magistrate would, according to the appellant's interpretation of the Ordinance, be obliged to convict and fine the unlucky victim of such an artifice.

As is pointed out by Dwarris *on Statutes*, p. 594: "In the "construction of a statute, it is the office of an expositor to put "such a sense upon the words that no innocent person shall receive "any damage by a liberal construction." We accordingly construe the word "possession," in the first line of this clause of the Ordinance, as not including innocent and unconscious possession.

We are anxious that our decision in this case should not be looked on as expressing an opinion that the finding prohibited quantities of arrack in a man's dwelling house is not of itself sufficient evidence for a conviction under this Ordinance. In the great

majority of cases it is by itself sufficient evidence and cogent evidence ; for a man may, as a general rule, be fairly presumed to know what the things are which he has in his house in which he is living at the time, and stories about the contraband article having been left there by people whom he does not produce ought to be regarded with great caution and suspicion. 1861. Oct. 29.

But we consider the finding of the Magistrate here on the facts to amount to a finding that the defendant's position was an unconscious and an innocent possession. We have no authority to review his finding as to facts, and we find that such a possession is not within the meaning of this Ordinance.

31st, October.

Present:—CREASY, C. J., TEMPLE, J., and THOMSON, J.

C. R. Ratnapura, No. 1056. *Samnahumy* v. *Silva.*

The judgment of the Court was as follows:—

Crops of *chenas*—Lease—Ord. No. 7 of 1840, cl. 2—"interest in land"—growing crops.

In this case, the plaintiff sues the defendant for $\frac{1}{3}$ share of the crops of certain *chenas* which the plaintiff was prevented from taking by a third party, and he claims £2.15.0 damages.

On examination, the plaintiff says "I took the rent of the "lands on lease for one year, for 5/6;" but comparing the plaint with the petition of appeal, it is clear that the plaintiff only bought the $\frac{1}{3}$ crops. This is also admitted in defendant's answer. There is nothing to show that the price was paid beforehand, so that the contract is wholly executory.

On the trial, a nonsuit was moved for under the 2nd cl. of Ordinance No. 7 of 1840, as the lease under which the plaintiff claims should have been on a stamp and attested by a notary. The objection was held good. Plaintiff was nonsuited with costs.

The plaintiff in effect excepts to this judgment on the ground that a growing crop is not an interest in land, the 2nd cl. of Ordinance No. 7 of 1840 requiring a notarial instrument. The question as to what is "*an interest in land*" has not only been the subject of much judicial enquiry under the English Statute of Frauds, but also of express decision in Ceylon.

The 4th sec. of the Statute of Frauds (England), enacts: "that no action shall be brought upon any contract or sale of lands tenements or hereditaments *or any interest of or concerning them,* unless the agreement upon which such action be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some person thereunto by him

1861. Oct. 31. — lawfully authorized." The Ordinance of Frauds and Perjuries somewhat differs from this in language and also in a principle which does not come into operation in this case.

The 2nd sec. of Ordinance No. 7 of 1840 enacts " that no sale &c. of lands &c., and no promise, bargain contract or agreement for effecting any such object, or for establishing any security interest or incumbrance affecting land &c," shall be of any force or avail in law, unless the same shall be in writing and signed by the party making the same and in fact otherwise notarially executed.

The question *what is an interest in land* is common to both enactments, and in determining the question, this Court has always made use of the English precedents. An interest in land is *not* created by any contract, *unless the contract confers an exclusive right to the land for a time, for the purpose of making a profit of the growing surface,* (i.e. when the surface *only* is in question); then the contract would be one for the sale of an interest in land. *Warwick* v. *Bruce*, 2 Maule and Selwyn, p. 205.

This has been the principle upon which all the cases respecting sales has been determined, and the English Courts have decided that in the first place the sale of a growing crop does not give any exclusive right to the land at any time, as even the right to go upon the land to gather the crop is only an easement which does not in any way pass any right to the land (per Holyrood, J. in *Evans* v. *Roberts*, 5 Barnewall and Cresswell, 837).

Nor has the right to have the crop remain upon the ground to infer any interest in the land; and this point the English Courts have settled by analogy to the doctrine of emblements. Lord *Ellenborough* says: in a contract for the sale of potatoes at so much per acre, " the potatoes are the subject matter of sale, and " whether at the time of the sale they are covered with earth in the field " or in a box, still it was the sale of a mere chattel " (*Warwick* v. *Bruce*, ante). Again in the case of *Sainsbury* v. *Matthews*, 4 Meeson and Welsby, 347, Mr. Baron *Parke* says that the sale of a growing crop " is a contract for the sale of goods and chattels at " a future day, the produce of certain land, and to be taken away " at a certain time. It gives no right to the land: if a tempest " destroyed the crop and there were no crops to deliver, the loss " would clearly fall upon the owner and seller of the crop; " or in other words, the owner of the land is the owner of the crops until the crop is severed; and in fact no property passes until the crop is delivered either by the severance by the owner, or by the purchaser being permitted to sever it for himself, which is indeed constructively a delivery by the owner.

Thus by the law of England, growing crops come within the description of emblements and are deemed chattels by reason of their being raised by labour and manurance. This applies how-

ever only to cereal crops, such as grain &c., and not to crops of grass or fruit. The view taken by the law of England has been affirmed by the law of Ceylon in the cases No. 10286 Negombo and 5670 Negombo C. R. (Nell's Rep. p. 112) 1861. Oct. 31. —

The first case related to an implanted crop of tobacco, and in this case, the Supreme Court makes a distinction between the sale of a growing crop and the sale of a crop the seeds or plants of which are not yet in the grouud, deciding that a sale of the former is not a sale of the interest in land, and that a sale of the letter is. This is conformable with all the English decisions, and also with the opinions of Lord Coke (Co. Litt., 556); and it may be laid down as a principle on the basis of both English and Ceylon precedents that the sale of any growing produce of the earth (reared by labour and expense and within the definition of *fructus industriales* or emblements) in actual existence at the time of the sale, whether in a state of maturity or not, is not to be considered an interest in or concerning land within No. 7 of 1840.

The second case decided by the Supreme Court on this question related to the sale of plaintain bushes. This case decided that sale to affect an interest in land ; but it does not militate against the principle laid down, as it does not appear that the Court regarded plantains as *fructus industriales*, or that they were planted prior to the sale.

The result of these cases, and of the many others which have been decided upon the subject, is thus stated in *Williams Saunders* [395, n. (g), Ed. 1871] *Duppa* v. *Mayo*. A similar and very clear view of this subject is also taken by Lord St Leonards (see *Concise View of Law of V. & P.* 78, Ed. of 1851). "It appears to be now settled, "that with respect to emblements or *fructus industriales* (i.e. the corn "and other growth of the earth, which are produced not spontaneously "but by labour and industry), a contract for the sale of them while "growing, whether they are in a state of maturity, or whether they "have still to derive nutriment from the land in order to bring them "to that state, is not a contract for the sale of any interest in land, "but merely for the sale of goods, *Evans v. Roberts*, (5 B. & C. 829), "*Sainsbury* v. *Matthews*, (4 M. & W. 343). And it will make no "difference whether they are to be repared or dug up by the buyer or "by the seller, *Jones* v. *Flint* (10 A. & E. 753). The true question "is, whether, in order to effectuate the intention of the parties, it be "necessary to give the buyer an interest in the land, or whether an "easement of the right to enter the land, for the purpose of harvest- "ing and carrying them away, is all that was intended to be granted "to the buyer." In this instance it is left doubtful whether the crops sold were growing crops or not. The case is therefore remanded for further hearing.

1861. Oct. 31. D. C. Jaffna No. 10853. *Nasavally* v. *Supramanian*

Pleadings—insufficient stamps—practice.

The judgment of the Supreme Court ran as follows:—

This is a suit for a divorce; but the only objection taken is that the proceedings are not on sufficient stamps: the defendant's advocate moved that the proceedings be quashed and the plaintiff non-suited with costs.

On this motion, the Court below adjudged that the defendant should have demurred to the libel, and not now take any objection to the class, when issue is joined and the case ready for trial. The Court below also held that the old stamps should be cancelled, and the pleadings written on proper stamps; that the objection of the defendant should be over-ruled, and the case proceeded with, the same being otherwise ready for trial. It was ordered accordingly.

The practice in such cases is laid down in Marshall's *Judgments*, p. 507, par. 7, p. 647, par. 18, and also in *D. C. Galle 17348*, reported in *Lorenz's* Rep.

From these precedents, it appears that when pleadings are insufficiently stamped, the proper course it to apply to the Court by motion, or to obtain a Rule to shew cause why the additional stamps should not be supplied within a given time. The order of Court (if it is satisfied that the application is correct) should be that the party having insufficiently stamped his pleadings should supply the additional stamps required within a given time. In this case, the order is so far wrong that the Court has cancelled the first set of stamps an the pleadings, which, if it means anything, means that, in the language of the Stamp Ordinance, it rules the pleadings to be unavailable to be unavailable in law; whereas the Court should have merely ordered additional stamps to be *supplied* so as to make up the deficiency in stamps. It appears that the plaintiff has complied with the order as regards her libel, but not as regards her replication, and that the defendants has not complied with the order.

It must however be understood that it is not intended that additional stamps should be annexed or affixed to the pleading insufficiently stamped (that is forbidden by the 12th cl. of the Stamp Ordinance of 1852); but that the party whose pleading is insufficiently stamped should apply for additional stamps under the 7th clause. That application necessitates the payment of a penalty of £ 10. And it will be for the party in fault to consider whether it will be better for him to pay the penalty, or commence his suit *de novo*. One course or the other he must take.

The Supreme Court thinks that the order of the Court below should be set aside, and the parties left to adopt the course

pointed out in the 7th, sec. abovementioned, or to agree to commence the suit *de novo* from the answer. At present by the 6th sec. of the Stamp Ordinance, there is no answer or replication available in law before the District Court. The defendant ought therefore to fill a fresh answer in supply additional stamps under the 10th clause, paying a penalty of £10. Similarly must the plaintiff with her replication at the proper time.

1861.
Nov. 5.

5th November.

Present:—CREASY, C. J., and TEMPLE, J.

D. C. Kandy No. 28954. *Sobita Unanse* v. *Ratnapale Unanse.*

Par delictum and *interest rei publicæ ut finis sit &c.*

The facts of this case are sufficiently indicated in the following judgment of the Court:—

This is an action brought by the plaintiff as executor of Dassankare Unanse to recover possession of certain land. The defendant claimed the land by deed of transfer from the same Unanse.

The *sannas* clearly shows that the land in question is temple land, and that it was held by Dassankare, not as a proprietor, but in the capacity of officiating priest of the temple.

This was admitted on both sides in the argument, and it was equally admitted that the deed of alienation to the defendant is void, and also that the plaintiff has no right in his character of executor to recover the land as if it were part of the estate of Dassankare.

But it appears also that the plaintiff is officiating priest of the temple, and that in that character he is entitled to the land.

If the plaintiff had sued for this land as executor by mere mistake or inadvertence, we should have had no hesitation in amending the proceedings and giving him judgment as we have been prayed to do. But we believe that the misdescription was intentional and that the plaintiff has been purposely endeavouring to treat this land as the private property of his testator, and not as temple land. We also believe that the defendant, when he took the deed of transfer from Dassankare, knew perfectly well the tenure of the land, and was wilfully participant in an attempt to despoil the temple.

We have been strongly inclined to nonsuit the plaintiff, on the maxim *in pari delicto potior est conditio possidentis;* but on the other hand, there is the maxim *interest rei-publicae ut finis sit litium;* and on the whole, we think it best not to make another

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action necessary, but to place at once the possession of the property where it is clear it ought to be, i.e. in the hands of the officiating priest.

We do not adjudicate the plaintiff to be officiating priest *de jure*, but only *de facto*. If the defendants or other persons have conflicting claims to the priesthood, as has been suggested, this judgment is not to prejudice those claims which have not been investigated in the present action.

We shall mark our sense of the plaintiff's misconduct by disallowing his costs.

D. C. Matara, No. 19487. } *Mathes* v. *Barton* et al. (The Queen's Advocate, intervening.)

Office of *mayoraal*—his duties—tenure of land.

The following was the judgment of the Supreme Court :—

In this case, the plaintiff had for many years prior to 1858 held the office of *mayoraal* of Naimbella in the District of Matara, and had during the time possessed the lands which this action was brought to recover.

In 1858 the Crown Officers dismissed the plaintiff from the office of *mayoraal* and took possession of the lands, alleging, as they now allege, that the lands were crown lands, the use of which was allowed to the *mayoraal* as remuneration for the discharge of the duties of that office ; that the office was revocable, and not hereditary ; and that, when plaintiff ceased by dismissal to be *mayoraal*, he had no longer any right to the land.

The plaintiff maintained that he and his ancestors were hereditary *mayoraals*, and that he and they before him held these lands as service *paraveny* lands, and that the effect of the Ordinance No. 3 of 1852 had been to enfranchise them and make them the plaintiff's absolute property.

After hearing the case very ably argued on both sides, and after repeated careful examination of the evidence, we feel no doubt whatever that the lands were not service *paraveny* lands at any time, to which the evidence refers, and we feel equally clear that the office of *mayoraal*, in this district at least, was not, and is not, hereditary. The plaintiff called as a witness his elder brother, who had been also a *mayoraal*, and had been in fact, until plaintiff's dismissal, joint *mayoraal* with him : the two brothers holding each one-half of the land which had formerly been held in entirety by one *mayoraal*. This witness described the duties of a *mayoraal* as follows :

"1. To superintend the culture of the fields ;

"2. To estimate the crop for taxation ;

"3. To sign the *wattooroos* upon which the government "share is farmed out ; 1861. Nov. 5.

"4. To furnish returns of crown lands when ordered ;

"5. To attend at rent sales, and otherwise to attend to any "order of the government agent or his assistant."

"The Government rents are still sold, crops still estimated for "for taxation. *Wattooroos* are still signed and cultivation still "superintended. All the duties of a *mayoraal* still exist."

This witness further stated : "I came into the lands on the "death of my further, and also into the office of *mayoraal* 60 years "ago. *I was appointed to the office by the mudalyar of the time*, and "acted under the office which is now identified with that of the "Government Agent, and I could not have held the office without "being so appointed. It was the usual custom for the son to be "appointed to succeed the father."

The plaintiff called one witness more, who proved that plaintiff's father was a *mayoraal*, and held the lands, which after his death "were held by plaintiff and last witness, who in return per-"formed the office of *mayoraal*."

If we were to take the case on the evidence for the plaintiff only, we should be disposed to consider that the lands were not *paraveny*, that is, heritable, lands at all, but that the possession of them was annexed to the office of *mayoraal*, and that the right to that office was given, not by inheritance, but by Government appointment. But the remainder of the proceedings places this beyond a doubt.

In the first place, the plaintiff's proctor, while the case for the crown was being opened, made a distinct admission that the lands were crown lands in 1829. We do not understand the specific imporance of this particular date, but we certainly find nothing that could have changed the lands from crown lands into service *paraveny* lands between 1829 and 1852, so as to have made the Ordinance of that year operate on them in the manner contended for by the plaintiff. But without straining the force of this admission, we look to the evidence for the crown, and we find the second defendant, who is a *mudalyar* of the District, and a witness named Wrikremeratne Christian, who is a *kachcheri mudalyar*, giving the most explicit testimony that the office of *mayoraal* is not hereditary, and the execution of its duties is remunerated with lands which pass with the office to the successor appointed by government. The fact the son usually succeeds to the father is not enough to make such succession a matter of right ; nor does the fact of the appointment being verbal make the office hereditary. If the offices and the lands were taken by inheritance, there would be no need for the son having a fresh appointment from the government, which the evidence on both sides shews always to have been obtained. And

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there is specific proof given for the Crown of the occasional dismissal of *mayoraals*, and that in such a case, the lands do not remain in the possession of the dismissed *mayoraal* or his family, but that they go to the successor whom the crown appoints to the office.

We do not think it necessary to determine what may be the correct Sinhalese title for the tenure of these lands. We are quite satisfied of the nature of the tenure, that the office is not hereditary, and that the holder of it is liable to dismissal by the Crown, in which case he loses the lands together with the office and does not retain the pay after he is discharged of the duties.

The judgment of the plaintiff is reversed. Judgment is to be entered for the defendant and for the Crown.

7th. November.

Present :—Creasy C. J., aud Temple, J.,

D. C. Kandy, No. 34395. } *Bandara Menika* et al. v. *Palingo Menika*

Kandyan Law—deed of alienation—clause of disinherison.

Plaintiffs, as issue of one Siam Banda Coralle by his first wife, sued defendant, his widow, for an undivided moiety of certain lands.

Defendant denied the claim of the plaintiffs and pleaded a paper writing or "deed of inheritance," dated 22nd August 1860, whereby her husband, Siam Banda Coralle, "made over and granted in *paravney*" to the defendant and her minor children the lands in question.

The plaintiffs demurred to this answer as insufficient, in that the paper writing pleaded did not (as was essential, under the Kandyan Law) contain a clause of disinherison in respect of plaintiff's share of inheritance.

The deed ran as follows:—

Know all men by these presents. Purport of a deed of inheritance caused to be written and granted by me E. W. R. Siam Banda Coralle late of.........and now residing at Hulongamowa in the Kohensea Pattu of Matela in the Central Province of the Island of Ceylon, is as follows :—

That the field called &c., [*names and boundaries of several lands being set out, the deed proceeded*] : these said high and low lands, houses, gardens and plantations, I the above named E. W. R. Siam Banda Coralle have made over and granted in *paraveny* to my wife M. Palingo Menika of &c., and to my begotten children [*duly named*] : to these six persons, with my good will and pleasure.

That henceforth my said M. Palingo Menika and my said five children [*duly named*] shall render me every assistance during my life-time; and after my death all the said high and low lands, houses, gardens and plantations, my said wife Patingo Menika, Loku Banda, Calloo Banda, Punchi

Banda, Muttoo Banda and Bandare Menika: these six persons and their descendants, assigns and heirs and every of them are empowered to possess for ever, and do whatever they may please, and they are hereby made over; and further from this day forth, none of the heirs, administrators and executors of the estate of me, the said Siam Banda Coralle, shall have any power or title to the said high and low lands, houses, gardens and plantations or any of them; and I have hereby covenanted that I have not hitherto done any act whatsoever whereby this deed of inheritance shall be cancelled; and for a deed in that behalf, I the said E. W. R. Siam Banda Coralle have set my signature &c. 1891. Nov. 7. —

The learned District Judge *(Smedley)* held that the document purported to be a testamentary disposition, and as such was governed by Ord. No. 21 of 1844, cl. 1. He was therefore of opinion that a clause of disherison was unnecessary; he accordingly over-ruled the demurrer.

On appeal, the Supreme Court set aside the order, and entered up judgment, on the demurrer, for the plaintiff, in these terms:—

The Supreme Court is clearly of opinion that the instrument under which the defendant claims is a deed of alienation, and not a last will and testament.

The case comes within the authority of *D. C. Kandy, 27150,** which the Supreme Court considers to have been rightly determined and to be conclusive in plaintiff's favour.

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* The facts of this case, as yet unreported, are these:

D. C. Kandy, No. 27150 } *Indejoti Unanse* v. *Keerale.*

Plaintiff sued in ejectment, claiming the lands in question under a deed, dated 1st May 1848, which was worded as follows:—

" Purport of a deed of *paraveny*, caused to be written and granted at " Kandy on 1st May 1848, is as follows,—

" I the undersigned Punchiralle &c., do hereby declare that my " *paraveny* property inherited to me from my father Dingiralle and possess- " ed since the last 50 years without dispute, and situate in &c., have been " transferred and made over to my younger brother by relationship called " Indejote Unanse, for the purpose of obtaining assistance to myself and " my wife Suberat Ettena, as both of us have no children, and entered into " the following agreement, to wit, that no dispute whatever can be made " in future against this by any of my descendants, either by word or deed, " and that the said Indejote Unanse shall during our mutual life render us " satisfactory assistance, and after our death to inter our dead bodies duly " according to the customs of the country, and perform all that is necessary " as religious rites for the sake of the other world. That from this day for- " ward, the said Indejote Unanse and his assigns shall possess the whole " of the said lands in undisturbed *paraveny* possession for ever, doing what- " ever they please with the same &c."

Defendant pleaded in effect that he was the son of Punchirale, and as such was entitled by inheritance to the lands in suit.

The District Judge found defendant to be the admitted heir-at-law of Punchirale, and that under the collective decision of the Supreme Court in *D. C. Kandy*, $\frac{4204}{21312}$ it was absolutely necessary, in order to render valid

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12th November.

Present:—CREASY, C. J., STERLING, J., and TEMPLE, J.

D. C. Kandy No. 31859. — *Simpson* v. *Power.*

Transfer of case from one District Court to another—practice.

The plaintiff applied to the Supreme Court, for reasons stated, that the above styled case be transferred from the District Court of Kandy to the District Court of Colombo. The Supreme Court in sanctioning the application, observed as follows:—

There is a defect in the proceedings before us, which we wish to mention as the matter is a point of common practice.

In all applications like the present, when the motion is made by one of the litigant parties, it ought to be shewn to the Supreme Court that the other side had notice of the intended application. This does not appear in the present proceedings.

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a revocable deed of the nature put forward by plaintiff, that an express clause of disinherison should exist. The District Judge therefore dismissed plaintiff's case.

On appeal, the Supreme Court set aside the judgment of the Court below and referred the case back to it, ordering special jurors to be summoned and, with their assistance, to find,—

" 1. Whether according to Kandyan Law, a deed such as is put forward by plaintiff ought to contain an express clause of disinherison, and if so, in what specific terms.

" 2. Whether if such a clause be requisite, the deed ought to set forth the reasons for such disinherison.

" 3. To what degrees of affinity to grantor, such requirements would extend.

" 4. To specify in what Districts of the Kandyan Provinces such law prevails."

And the Supreme Court ordered the District Court to give judgment accordingly (19 November 1856.)

Special assessors being summoned by the District Court as ordered, they were unanimously of opinion,—

" 1. That in order that a deed such as the one in question may be valid, it must contain a clause of disinherison.

" 2. That such a deed should set forth the reasons of disinherison, such as, failure to render assistance, undutiful conduct, ill treatment, or generally such conduct as is displeasing to the parent.

" 3. That such requirements extend as respects all persons who are the lawful heirs of the proprietor, no matter how near or distant may be their affinity to him.

" 4. That this law or custom, so far as their knowledge extends, applies to the whole of the Kandyan Country."

Accordingly the District Judge found as follows :—

" Thus the assessors, three of the highest and most intelligent and experienced of the Kandyan chiefs agree entirely with the law laid down in my original judgment, which must therefore stand." (16th June, 1857).

To prevent delay, the Supreme Court grants an order, but only a conditional order for the removal of the crops as prayed, on the plaintiff obtaining and filing in the District Court a written consent of the defendant or his advocate or proctor. 1861. Nov. 26.

26th November.

Present:—CREASY, C. J., STERLING, J., and TEMPLE, J.

D. C. Kandy No. 30632. — *Samsudeen Lebbe* v. *Assene Lebbe* et. al.

Ejectment—damages—prescription.

This was a suit in ejectment brought on the 22nd December, 1857, by plaintiff, as administrator of one Casi Lebbe, deceased. Plaintiff averred that a Packir Tamby, being indebted to the intestate, mortgaged to the latter a house and grounds, with possession thereof in lieu of interest; and that while the intestate was in such possession, the defendants on the 6th day of December 1852, wrongfully ousted him. Plaintiff prayed for ejectment, claiming as damages £ 72, "being the issues, rents and profits of the said house and grounds taken and appropriated by the defendants as aforesaid."

The learned District Judge rejected the claim which defendants had made to the property, and gave judgment for plaintiff as prayed.

On appeal, *Rust* and *Dias* for appellant contended *inter alia* that under cl. 9 of Ordinance No. 8 of 1834, damages could not be recovered for any period more than 2 years before action brought.

Lorenz contra.

The Court amended the decree of the Court below in the following judgment:—

The Supreme Court considers the decision of the Supreme Court in *D. C. Kandy 26750* * conclusive on this subject; even had there been none such, we should have come to the same conclusion. The 9th clause of the Ordinance No. 8 of 1834 bars the recovery of damages in respect of any period more than two years

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* The following are the facts of this case, hitherto unreported.

D. C. Kandy No. 26750. — *Sudhana* v. *Ukku Banda.*

Suit brought on 8th July 1853, in ejectment. Ouster, June 1849. Damages claimed at the rate of £ 5 from June 1849, to December 1852.

Judgment as prayed for £ 15.

On appeal, *per* ROWE, C. J., (12th August, 1857)—Decree modified "by the plaintiff being entitled to £ 10 sterling, the damages for two years "only, under the 9th cl. of Ord. No, 8 of 1834."

1891. Dec. 3. — before action brought. We think however that plaintiff is entitled to have added to this, damages claimed at the same rate for the time which shall have elapsed between the bringing of the suit and the time the defendant gives up possession. The delay during this interval is in no respect the fault of the plaintiff, but is the inevitable consequence of the course of legal proceedings: *actus curiæ nemini facit injuriam.* We think the plaintiff is not to be driven to a fresh action to recover compensation for being kept out of possession, while his case was before the Court.

The verdict will therefore be reduced to £ 36 in respect of the two years before action brought, and also for the further sum calculated at the rate of £ 1.10 from 22nd December, 1857, the commencement of the action, to the day on which defendant shall give up possession.

3rd December.

Present:—Creasy, C. J., Sterling, J., and Temple, J.

C. R. Ratnapoora No. 662½. — *Unguhamy* v. *Kittia Unanse* et. al.

Practice—non-joinder of Kandyan widow—mesne profits—prescription.

The following judgment of the Supreme Court sets out the facts of the case:—

In this case, the plaintiffs father bequeathed certain land to a *wihare* of which the first and second defendants are the priests. This bequest was set aside in the testamentary case No. 156 Ratnapoora, as being contrary to the Proclamation of the 13th September 1819, when the lands so bequeathed devolved on the present plaintiff as heir-at-law.

The plaintiff now sues to recover the *mesne* profits from April 1853 till February 1860, the period during which the defendants had possession of the lands. Judgment has been given for the plaintiff upon evidence, the defendant declining to call any, contending that the defendant should be non-suited because the testator's widow has not been made a co-plaintiff.

The Supreme Court considers that the widow, being otherwise amply provided for by the will of her husband, has no interest in the land in question and should not be a party to the suit.

All that a widow is entitled to under the Kandyan Law is maintenance and support, and for this purpose she may receive from the heir either a portion of the produce of the deceased's *paraveny* lands, or she may have the temporary possession and usufruct of a suitable portion of such lands, and in the latter case, the heir-at-law shall perform the *rajakaria* or personal service due

on account of that portion. But in this case, being otherwise provided for, the widow does not require, and is not entitled to, further maintenance. If the lands in question were the acquired property of the testator, and as such subject to the life-estate of the widow, it was for the defendant to prove such to be the case, which they have not done. 1861. Dec. 5.

It is moreover clear from the will, that the testator in bequeathing other lands to his widow, while he gave this land to the *wihare*, never intended him to have any claim upon this land in question.

The decree of the Court below is affirmed, except as to the amount of damages, the plaintiff, under cl. 9 of the Ordinance No. 8 of 1834, being only entitled to recover the mesne profits for two years prior to the commencement of this suit: such profits to be calculated on the same data as those given by the judgment of the Court below.

5th December.

Present:—CREASY, C. J., STERLING J., and TEMPLE J.,

C. R. Calpentyn No. 17716. } *Sinne Wappoo* v. *Mohamado Aly* et al.

The judgment of the Court below was set aside, and case remanded for trial, in these terms :—

Custom—planting share—Evidence.

It is an acknowledged custom of the country that persons who have entered upon land with consent of the owner and have actually planted it with cocoanuts, are entitled to a share of the trees when they come into bearing. They may claim this by operation of law, and not as a consequence of the terms of any agreement between them and the owners.

The plaintiff therefore should be allowed to prove that he entered under such circumstances, and if he can do so, the absence of a written agreement is not fatal to his claim.

It is moreover stated in the plaint, that plaintiff planted the trees 22 years ago, and was only ousted one and a half years ago. If so, he may be able to prove a prescriptive possession of the planting share.

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D. C. Ratnapoora, No. 7126. *Tillikeratne* v. *Dingey Hamy.*

Kandyan Law—*nindegama*, its nature—tenure of service.

The facts of this case are sufficiently indicated in the following judgment of the Supreme Court:—

This was an action brought by the plaintiff, as proprietor by purchase of a *nindegama*, against the defendant as tenant by service for refusal to perform the customary services. The plaintiff claimed damages for past refusal and prayed that the defendant should be compelled to render the customary services in future, or be ejected for default in so doing.

The defendant by his plea denied his liability to service to the proprietor of the *nindegama* in respect of the lands held by him, the defendant; he also denied that plaintiff had purchased the *nindegama* as alleged in the plaint.

When the case came on for trial, the District Judge stated that the case might be decided without hearing evidence, and he proceeded to nonsuit the plaintiff, after giving an elaborate judgment to which we have paid careful attention.

The District Judge seems to hold that the plaintiff, as owner of this *nindegama*, is not entitled to demaud the customary services from the tenants for these reasons:

(1) that a *nindegama* including the right of the services, cannot be acquired by purchase ;

(2) that a new *nindegama* proprietor cannot exact these services if he is not domiciled in the Kandyan Provinces ;

(3) that no new proprietor can exact the services, if he is of a caste inferior to the caste of the tenant.

The learned Judge further states as a fact, that the present plaintiff is *modliar* of the Ratnapoora District Court and a native of the Maritime Provinces.

None of these objections is raised by the defendant in his pleadings, and the only one that is supported by matter apparent on the face of the record is the first.

We think this objection untenable. We find no authority whatever for the general proposition that the owner of a *nindegama* cannot alienate by sale, or that a Fiscal cannot, in due process against such owner's property, transfer the *nindegama* with all its proprietary rights, so that the purchaser may hold as fully as the last owner. On the contrary, we find that in several cases of such sales, when disputes have arisen between the new owner and the tenants, no objection of this kind has been raised. The District Court Ratnapura case No. 7013 is one of these. The judgment of the Supreme Court in that case directs the defendant (the tenant) to continue in possession as theretofore, on tenure of service to the plaintiff, the purchaser.

The second and third objections are partly based on assumptions of facts that have not been proved, and of which the Court cannot take judicial notice. The case must go back for trial of the issues which the parties have raised. But as, after what has taken place, the defendant will probably amend his pleadings and raise the suggested defences, we think it desirable to make some remarks on them.

1. The anticipated objection about domicile ought not to prevail. Even if any restrictive custom of the kind as to capacity for holding *nindegama* ever prevailed among the Kandyans, (in support of which we find no authority), the state of things is essentially altered from what it was when Kandy was a separate and independent kingdom, and when Kandyans and low country Singhalese were aliens and foreigners with regard to each other. They are now fellow subjects of the same sovereign.

2. There remains for consideration the expected objection on the ground of caste. This can only arise after legal evidence that the plaintiff is of inferior caste to that of the defendant, and also after full and satisfactory evidence of the existence of such a customary law in the Kandyan Provinces, as the District Judge has assumed to exist. If evidence to that effect is tendered (on pleadings properly framed), it must be received ; and the value of it, and any authorities that may be cited, must be duly considered at the proper time. At present, we are aware of no authority to shew the existence of such a law. We have caused extensive and long continued researches to be made on the subject, and though we can find nothing expressly determining the question, the general result of our enquiries is to make us disbelieve the existence of such a distinction between the right of persons as is suggested here. Such a distinction is opposed to the general principle on which justice should be administered, the principle of the equality of all H. Majesty's subjects in the eye of the law.

We will not prejudge the effect of any proof or authority, which the defendant may be able to adduce in order to shew that there is an exceptional distinction here, but the burden of proof lies on him and the proof ought in such a case to be full and clear. It will be to his advantage if he shews that the services in question cannot be performed by deputy, and that a low caste proprietor cannot, if the pleases, exact a pecuniary compensation for non-performance, even if he cannot treat such non-performance by a high-caste tenant as a forfeiture, and eject the tenant on that account.

1861. Dec. 5. — District Courts—power to issue writ of *habeas corpus* —nature of such writ—interpretation of statutes.

D. C. Kandy, No. 6625. *Re* application of *A. R. Shaw* of Kandy for a writ in the nature of *habeas corpus.*

The facts of this matter are fully set out in the following judgment of the Supreme Court :—

This is an appeal from an order of the District Court of Kandy for the issue of a writ in the nature of a writ of *habeas corpus* directed to Ann de Lange and her husband Gerard de Lange, requiring them to produce, on Monday the 21st October, the bodies of the infants in the annexed affidavit mentioned, before that Court, and there to shew cause why the said infants should not be delivered to the custody of their legal guardians, the said Alfred Shaw, for the causes in the said affidavit set forth.

The writ was (very properly) obeyed by the parties to whom it was directed, and on the return, cause was shewn, and the writ was discharged on the merits. But those parties have appealed to this Court against the order of the District Court for the issuing of this writ.

The appellants maintain in their petition of appeal that a District Court has no power to issue writs of *habeas corpus.* The question is one of great constitutional and of great practical importance, and we quite agree with the opinion expressed by the learned judge below that it is desirable to have the law on such a question settled as soon as cau properly be effected. We have therefore given our prompt and most careful oonsideration to this case. We caused the attention of the Queen's Advocate to be drawn to it; and we have had the benefit of the attendance and of the comments of that learned functionary at the argument. No one argued before us on behalf of the appellants, but the respondents, who had to maintain the validity of the writ, were fully represented by counsel, (Mr. Lorenz).

It was admitted by the counsel for the respondents (and the fact is indisputable), that the power to issue writs of *habeas corpus* is no where expressly given to the District Courts by any imperial statute, by any Charter, by any Ordinance, or by any Order in Council now in force. It is admitted also that the cases in which the District Courts have taken on themselves to issue such writs have been few and exceptional, and that the question of the validity such writs has never previously to the present occasion been brought before the Supreme Court. It is equally certain that the Supreme Court is expressly authorised by the 49th clause of the Charter to grant writs of *habeas corpus,* and that it has consistently been in the habit of granting them.

The contention of the respondents is that the District Courts are authorised by implication, though not by express words, to grant these writs. In order to test the validity of this alleged

implication, it is necessary to trace minutely the growth of an important branch of the law of this colony, and to have regard also to the analogous law of England. 1861. Dec. 5.

It is desirable in the first place to call to mind, and to keep clearly before the mind, certain general facts and principles, and also to consider if there is any peculiar canon of interpretation which we should follow, when in the course of our enquiry we have to deal with imperfect or doubtful phraseology.

We shall, therefore, by way of preliminary matter consider (1) the general nature and character of the writ of *habeas corpus*, and what Courts in England could issue it, (2) the general nature and character of the District Courts and Supreme Court in this Island, (3) what special rule, if any, of judicial interpretation is furnished by the nature of the subject before us.

It is a maxim of law that "the writ of *habeas corpus* is a very high prerogative writ, by which the king has a right to enquire the causes for which any of his subjects are deprived of their liberty." Such is the definition given (after Hale and other authorities) by Lord Eldon in *Crowley's case*, 2 Swanston 48, a case that deserves the most attentive perusal of all students of constitutional law, and in which some inaccuracies of Blackstone are corrected. There is another definition of the writ of *habeas corpus* by Sir John Wilmot, also cited by Lord Eldon with approbation in *Crowley's case*, and which deserves citation with special reference to the matter now before us. Sir John Wilmot says: "It is a remedial mandatory writ, by which the King's *Supreme Court of Justice* and the Judges of that Court, at the instance of a subject aggrieved, commands the production of that subject, and enquires after the cause of his imprisonment; and it is a writ of such a sovereign and transcendant authority that no privilege of person or place can stand against it." It is to be remembered that Sir John Wilmot is speaking, as is Lord Eldon, of the writ of *habeas corpus* at Common Law, and not as dependant on the special provisions of 31 Car., 2, commonly called the Habeas Corpus Act.

Originally, in England, an ordinary person who was detained in unlawful custody could claim his writ of *habeas corpus* from one of two Courts: each being in its sphere, a Supreme Court. One of these was the Court of King's Bench, the supreme criminal court of the whole realm. The other was the High Court of Chancery, which, according to Lord Coke, is an *officina justitiae* always open. If the aggrieved person was an officer or had other privilege in the Court of Common Pleas at Westminister, or in the Court of Exchequer, he might, if he chose, obtain his *habeas corpus* from the court in which he was so privileged. Afterwards, by means of certain well-known legal fictions, almost any person could be treat-

1861. Dec. 5. ed as privileged in the Common Pleas or Exchequer; and in Bushel's case, 1 *Vaughan* 133, *Mod.* 119, 184, 6 *Howell's State Trials* 999, in Charles ii's reign, the Common Pleas decided that they could issue writ wholly irrespective of privilege. We shall revert to this decision presently, because the argument in favour of the present respondent seems to arise from it, to which we have have given due weight and consideration.

It is clear that the High Court of Chancery and the three Superior Courts of Common Law, each possessing a general jurisdiction over the realm of England, are the only English Courts that have ever issued this writ. No inferior, no local tribunal, such as the County Courts or the Sheriff's Tourn or the Court of Quarter Sessions, even assumed such a power. The very high prerogative writ was an instrument to be wielded only by Courts of very high order.

2ndly. When we consider the general nature and character of the District Courts in this Island, we find (as either name imports) that they have jurisdiction, not over the whole Island, but each over a limited area. Within these limits, each District Court has jurisdiction over all civil pleas, suits and actions, over idiots and lunatics, over administrations and revenue causes, and over matrimonial causes. There is a criminal jurisdiction also, but that jurisdiction does not extend to offences of a grave character, which the provisos in the Charter and in the subsequent Ordinances in that respect define. An appeal from any proceeding of the District Courts lies to the Supreme Court, which also may issue writs of *mandamus*, *procedendo*, and prohibition to the District Courts. The jurisdiction of the Supreme Court is general over the Island, and it has expressly given to it an original jurisdiction in respect of all crimes and offences wheresoever in the Island they are alleged to have been committed. The Charter gives it expressly the power to issue writs of *habeas corpus*, and a subsequent Ordinance gives that power to any Judge of the Supreme Court at all times and in any part of the Island.

3rdly. There is a special rule of interpretation to be observed when we construe the various Charters and other legislative documents that bear upon the case before us, and when we examine whether they extend to our District Courts the salutary power of vindicating the liberty of the subject by the speedy and effective agency of a writ of *habeas corpus*. It is the rule that a remedial statute is to be liberally construed (*Dwarris*, p. 632). This rule cannot be more strongly expressed than in Lord Eldon's own words respecting the judicial advancement of the claims of the English Court of Common Pleas to grant generally writs of *habeas corpus ad subjiciendum*. He terms it "a remarkable example of the "strength of the principle which our law has in it, that with respect

"to the liberty of the subject, the Courts are to struggle to secure "it." Still, the Court cannot assume the power of *making* laws for this purpose. We can only interpret what we find made: we must interpret it in the sense in which we believe it to have been framed, when we cannot see clearly what that sense was; it is only in matters of doubt that the presumption in favour of liberty can be applied. 1891. Dec. 5.

We now address ourselves to the consideration of the actual legislation that has taken place, as to the power of our colonial Courts, or any of them, on this subject. And although the existence of our District Courts and of our present Supreme Court dates only from the grant of the Charter of 1833, it is material to look to what had previously taken place since the acquisition of Ceylon by the British Sovereign.

It is not pretended that any of the Dutch Courts which we found in existence here, exercised any remedial jurisdiction against illegal imprisonment analogous to the process of *habeas corpus.* It is equally undisputed and indisputable that that writ was never granted by the local Courts, called Provincial Courts, which under the English regimen superseded, with a brief intermission, the Dutch local Courts, called *Landraad* Courts, and which said Provincial Courts were in turn superseded by the present District Courts; and it is also equally certain that the Supreme Court, which was created here by the Charter of 1801, did habitually grant these writs; it is further certain that the Charter of 1801 did not by express terms give the Supreme Court that power, but that it was assumed by implication down at least to the date of an order in Council of the year 1830, of which more particular mention will be made presently.

We fortunately possess very full and trustworthy means of knowing the state of the judicature in Ceylon during the period of which we are now speaking, i. e. from 1801 to 1830. Authentic copies are in existence of the answers given in 1830 by Sir Richard Ottley and by Sir Charles Marshall to the questions of His then Majesty's Commission of Inquiry into the Laws and Courts of Ceylon. Sir Richard Ottley was then Chief Justice of the Island, and Sir Charles Marshall, Puisne Justice. We have had the advantage of consulting these, and also we have extant the Reports of Mr. Cameron, one of the Commissioners of Enquiry, on whose recommendation, the Charter of 1833 was principally framed. All these speak of the issuing of writs of *habeas corpus* by the Supreme Court without express authority, and they all advise that express legislative authority to that effect should be given to the Supreme Court. Nothing of the kind is advised as to any other Court. Sir Charles Marshall refers to the 82 cl. of the Charter of 1801 as impliedly giving that power to the then Supreme Court by authorizing it to issue writs of error; and he remarks that the

1861. Dec. 5. — writ of *habeas corpus ad subjiciendum* is in the nature of a writ of error to review the valididy of a committal. That reasoning however would only apply to cases where the imprisonment was by color of legal process: it would not hold good with respect to the numerous class of cases where a *habeas corpus* is needed to remedy unlawful restraint exercised by one private person over the liberty of another, such as was alleged in the very case now before us. Perhaps the 44th clause of the old Charter might have been called in aid, which ordained that the Supreme Court should administer criminal justice and have jurisdiction over *(inter alia)* all crimes, offences, misdemeanours and *oppressions.* The word "oppression" need not be construed as having been used as a term known in Roman Dutch Law (like the term "concussions" which occurs in the same clause), but it might be fairly taken as used in its common English sense, as it is employed in the English statutes of 11 and 12 W. iii. c. 12 for the punishment of oppressions committed in the Colonies.

In 1820, after (and probably in consequence of the commission of inquiry), an order of council was made as to the issuing of the writ of *habeas corpus* in this Island, which requires careful attention ; and that we may fully understand it, we must first look at a Regulation of the Ceylonese Government which had been made here in 1824 [we may also in passing observe that there had been a new Charter in 1810, but that new Charter had, so far as it increased the power of the Supreme Court, been abrogated in 1811 and it is of no importance with regard to the subject before us.]

In 1824, a person named Rossiter had been arrested by order of the Colonial Government, and had applied to the Supreme Court for a writ of *habeas corpus.* Pending the argument, the then Lieutenant Governor in council "declared and enacted that it was "is and shall be lawful to any officer, civil or military, or other "person in whose custody or keeping any person or persons may "be, under orders from the Governor, or in his absence the "Lieutenant Governor of this Island, signified to him in writing "under the hand of such Governor or Lieutenant Governor or by "the signature of the chief or Deputy Secretary to such Govern- "ment by authority of the said Governor or Lieutenant Governor "to certify a copy of such order as the authority under which "such person or persons is are or may be detained in his custody, "in return to any process of any Court calling on him to produce "the said person or persons, or to shew the authority for the "detention of such person &c., and such return shall be and is "hereby declared to be a sufficient return to such process, without "the production of such person or persons, and shall be allowed "as a good and sufficient return by every Court within this "Island, and as barring every further proceeding of such court in "respect to such person or persons upon such process."

This strange regulation was formally disallowed by Order in Council made by His late Majesty William IV, on the 1st November 1830. But the Order in Council of 1830 did much more. After the disallowing part, it proceeds as follows: "and it is "hereby ordered that all or any person or persons that are or shall "be in prison within the said Island of Ceylon by warrant of the "Governor of that Island, signed by himself and by two members "at the least of the Council of Government thereof, for high treason, "suspicion of high treason, or treasonable practices, may be detain-"ed in safe custody for 18 calendar months next after the date "of any such warrant without bail or mainprize; and that no "Court or judge or officer or other person or persons whomsoever "within the said Island, by virtue of any authority in him vested, "shall discharge or admit to bail or try any such person or persons "committed, without order from His Majesty through one of His "principal Secretaries of State, or from the Governor of the said "Island for the time being, any law or statute to the contrary "notwithstanding. Provided always, and it is further ordered, that "the Governor of the said Island issuing any such warrant afore-"said shall record in the Minutes of the Council of Government "of the said Island the causes and grounds of any such commit-"ment and shall transmit to His Majesty through one of his "principal Secretaries of State by the first possible opportunity a "full transcript of such minute, and that if it shall not appear to "His Majesty fit that such imprisonment of any such person as "aforesaid should be prolonged, the said Governor shall, upon the "signification of such His Majesty's pleasure through one of his "principal Secretaries of State, cause any such person to be forthwith "discharged from further imprisonment or admitted to bail, or put on "his or her trial, as His Majesty shall be pleased to direct. But if "in any such case, His Majesty shall through one of his Principal "Secretaries of State signify his pleasure that any such person "should be longer continued in prison, then the person or persons "with reference to whom His Majesty's pleasure shall be so signifi-"ed, shall be detained in safe custody, without bail or mainprize, "until the expiration of such further time as His Majesty shall "be pleased to direct, and during such further period of imprison-"ment it shall not be lawful for any Court or judge or officer or "any other person or persons whomsoever within the said Island "by virtue of any authority in him vested, to discharge or admit to "bail or try any such person or persons without order from His "Majesty through one of his principal Secretaries of State or from "the Governor of the said Island for the time being, any law or "statute to the contrary notwithstanding. 1861. Dec. 5.

"And *for the removal of all doubts,* it is further declared by "His Majesty with the advise of his Privy Council, that except in

1861. Dec. 5. "the cases aforesaid, *it is* and shall be competent to His Majesty's "Supreme Court of Ceylon or to any Judge of that Court to issue "writs of *habeas corpus* or *mandates* in the nature of such writs, "as fully and effectually and under such and the like circum-"stances as by the law of England writs of *habeas corpus* can "or may be issued by any of His Majesty's Supreme Courts of "record at Westminster or by any Judge at any of those Courts.

"And it is further ordered that the said Supreme Court of "Ceylon shall and is hereby authorized and required to make and "establish such rules of practice and proceedings as the local "circumstances of the said Island may require, for adapting to the "exigencies of the said Island so much of the law of England as "relates to the issuing and proceeding upon writs of *habeas corpus.*

"And it is further enacted that the present order shall con-"tinue and be in force until the 31st December 1834, and no "longer."

In 1833, the present Charter was granted by which the District Courts were created with the powers already mentioned, and by which the present Supreme Court was established. It will be remembered that Sir Richard Ottley, Sir Charles Marshall and Mr. Cameron had all strongly recommended that express power to grant writs of *habeas corpus* should be given to the Supreme Court, and accordingly we find in the 49th section of the Charter these words :

"And we do further ordain and appoint that the said Supreme "Court or any Judge thereof at any sessions so to be holden as "aforesaid or in the District of Colombo or at any general sessions "of the said Court collectively, shall be and are hereby authoriz-"ed to grant and issue mandates in the nature of writs of *habeas* "*corpus*, and to grant or refuse such mandates to bring up the "body of any person who shall be imprisoned within any part of "the said Island or its dependencies and to discharge or remand "any person so brought up or otherwise deal with such persons "according to law."

It was contended in the argument before us in the present case that the Supreme Court was hereby authorised to grant writs of *habeas corpus* in these cases only when the imprisonment is under color of legal process. But we are clearly of opinion that no such limitation exists. The words are ample enough to comprise all cases, and we wish that no doubt should for a moment be entertained as to the Supreme Court having the power to grant the sovereign and summary remedy of process by *habeas corpus*, in all cases whatever of unlawful imprisonment or forcible detention. We say emphatically "all cases whatever," because the Order in Council of 1830, which we spoke of lately, and the Order in Council of 1835, which we are about to speak of, have long ago expired.

After the receipt and proclamation of the Charter, but before the day on which it was to come into operation, a Regulation was made, 6 of 1834, which in order to obviate doubts declared that the new District Courts succeeded to all the powers of the Provincial Courts and the local Courts (therein enumerated) which were abolished by the Charter and which were to be replaced by the new District Courts. It is enough for the present to state that none of the old Courts had ever granted writs of *habeas corpus*. 1861. Dec .5. —

In 1835 appeared the first and only legislative document that decidedly purported to give any power of granting writs of *habeas corpus* to the District Courts. It decidedly and unquestionably purported to give certain limited powers of the kind for a limited period. Whether by implication it recognised any powers of the kind and sanctioned such powers in perpetuity is a point of the utmost importance in the present case, and every word of this legislative document must be carefully examined.

It is an Order in Council dated at the Court of St. James, 4th of March 1835. It runs as follows:

" Whereas by an order of H. M. in Council bearing date on " on the 1st of November 1830, certain regulations were made res- " pecting the issuing by the Governor of the Island of Ceylon of " warrant for the arrest and detention of persons charged with or " suspected of treason or treasonable practices, and respecting the " powers of the Supreme Court of the said Island in regard to " issuing writs of *habeas corpus* or warrant in the nature of such " writs for bringing before them the bodies of any person so arrest- " ed or detained. And whereas the said order expired and ceased " to be in force on the 31st December now last past, and it is ex- " pedient that the same be revived and continued in force until " the time hereinafter in that behalf mentioned. Now therefore " His Majesty by and with the advice of His Privy Council doth " order, and it is hereby ordered, that the said Order in Council " of the 1st of November 1830 shall be, and the same is hereby, " revived and shall continue in force until the 31st day Dec. 1859."

" Provided always, and it is hereby further ordered by the " authority aforesaid, that in all parts of the said recited Order in " Council in which the Supreme Court of Ceylon is mentioned, " reference shall, *during the continuance of the present order*, be under- " stood and be taken to be made to the Supreme Court *and the* " *District Court* respectively in the Island of Ceylon, mentioned in " H. M's Letters Patent under the great Seal bearing date at " Westminster on the 18th February 1833."

When we look back to the order of 1830, we find that order by its 3rd clause declaring and recognizing the power of the Supreme Court except in the cases specified in its first and second clause. The order of 1835 by its second clause applies the 3rd

1861. Dec. 5. — clause of the order of 1830 to the District Courts. It follows therefore that the order of 1835 gave to the District Courts power until the end of the year 1839 to grant writs of *habeas corpus*, except in cases falling within the 1st and 2nd clauses of the order of 1830.

The most favourable way in which an argument could be drawn from these orders in support of an enduring aud still existing power as to writs of *habeas corpus* in the District Courts is perhaps as follows : " The Supreme Court as existing in 1830 had had no express power given to it as to writs of *habeas corpus*. It claimed and exercised that power as given by implication. The order of Council of 1830 recognised the existence in the Supreme Court of that implied power, but ordained that for a limited period such power should be subject to certain restrictions; so in 1835, when District Courts had come into existance having no power as to writs of *habeas corpus* expressly given to them, but having (as we say) a claim to them by implication, came an order in council which recognized the existence in the District Courts of that implied power, but subjected the exercise of it to restrictions for a limited period. The restrictions were to be temporary: the recognition is vested in perpetuity."

But in the first place, there is no proof, there is not even reason to suspect that the District Courts had, between 1833 and 1835, been exercising or claiming the power to grant a *habeas corpus*; whereas the Supreme Court had undoubtedly exercised that power from 1801 to 1830; and (what is more important), there is a well-known rule of interpretation which we cannot and ought not to disregard. It is the rule thatdirects effect to be given, if possible, to every sentence and to every word in a Legislative instrument. What then is the meaning of the words "*during the continuance of this present order*," in the 2nd clause of the Order which provides that in all parts of the Order of 1830 in which the Supreme Court is mentioned, reference shall *during the continuance of the present order* be understood and be taken to be made to the Supreme Court and the District Courts. According to the construction which must be put on the order for the purpose of raising the argument in it in favour of the power of the District Courts, these words of limitation are meaningless. It had already been declared that the revival of the Order of 1830 should not enure beyond 1839. The restrictive parts of the Order of 1830 would therefore have expired at the end of 1839, without the use of the special words which we are con, sidering. But the employment of those special words make it clear that the enabling part of the order was to be as limited in vitality asthe disabling. Until the 31st December 1839, and no longer- the words, which declared the Supreme Court of 1830 to have power as to writs of *habeas corpus*, were to be construed as extend-

ing to District Courts. The Order in Council of 1835 cannot be regarded as more than a temporary experiment in vesting a new power in the District Courts for a defined period ; and at the expiration of that period, it was not thought fit to renew the power. 1861. Dec. 5.

Viewing the Order of 1835 as thus transitory in effect, we have not thought it necessary to discuss the objection which the learned Queen's Advocate raised during the argument against the vitality of that Order on constitutional grounds.

There has been subsequent legislation on the subject of *habeas corpus.* In 1843, power was given to any Judge of the Supreme Court to issue the writ at any time and at any place in the Island, and full power to grant writs of *habeas corpus* has been carefully assured to the Supreme Court by the Ordinance 2 of 1850, which in some respects varied its constitution. Several Ordinances have also been passed, which have modified the constitution of the District Courts. but not a legislative syllable later than the Order in Council of 1835 can be found which in any way associates the District Courts and writs of *habeas corpus.*

When on a review of the whole subject, we seek and strive *in favorem libertatis* to find reasons in support of the claim of the District Courts to grant this remedial writ, it seems to us that the chief arguments (besides that based on the order of 1835, which we dealt with in passing to avoid prolix repetition) for the present respondents' case, are:

1st. The argument from analogy to be drawn from the course taken by the English Court of Common Pleas in *Bushel's* case. That Court thus resolved (though contrary to the opinion of its Chief Justice) that it had by implication general power of granting writs of *habeas corpus* irrespective of privilege. But in that case, there was much to imply from, to which nothing analogous can be found with respect to the District Courts. The Statute of 16 Car i. had put the Common Pleas on the same footing as the King's Bench as to certain specific writs of *habeas corpus* and there were general words about discharge, or payment of fees, which the majority of the Common Pleas judges construed into the recognition of a general power. It is to be remembered also that the Common Pleas was a superior Court of general jurisdiction in the realm ; and special stress was laid on this by the judges who in *Bushel's* case laid it down as a general principle, that if a subject of the King is brought before one of the King's *superior* Courts, and it appears that the imprisonment is unlawful, the Court cannot *salvo juramento suo* remand him to that unjust imprisonment.

2nd. An argument by way of analogy may be drawn from the fact of the Supreme Court of this Island having from 1801 to 1830 exercised an implied power of issuing these writs, which power was ultimately expressly recognised. But there is no Char-

1861. Dec. 5. — tor or Regulation or order or Ordinance that gives to the District Courts the express order of issuing writs of error or an express jurisdiction over oppressions, such as the Supreme Court had by the old Charter, and which has been above discussed. There was an argument also (which is urged by Sir Charles Marshall in his answers to the Commission) that it must have been intended by the sovereign, in granting a Charter for the full administration of justice here, to place somewhere the power of granting writs of *habeas corpus*, and that the natural depository of such power was the Supreme Court. Nothing of the kind can be urged in favour of the claim of the District Courts, in as much as the very Charter which called them into existence placed elsewhere the power of granting those writs. And there is the continually recurring distinction between a Court with general jurisdiction over the Island and a Court with jurisdiction limited to a section of it.

Lastly, there is the argument relied on in the judgment of the Kandy District Court in this very case, the argument that District Courts must have power to issue writs of *habeas corpus* by implication as ancillary to higher powers which are expressly vested in them. The learned Judge of the Kandy District Court refers to its jurisdiction over idiots and lunatics, over testamentary and matrimonial matters, and urges that the duties of his Court in these matters could not adequately be performed without power to issue this writ.

We fail to perceive the streugth of this reasoning. In the first place, it seems inaccurate to treat the "very high prerogative writ of *habeas corpus*" as inferior to any process or authority with which the District Court is expressly entrusted. Next, as to the necessity of such power as is now clamed to enable the District Courts to perform their duties with regard to idiots and lunatics and as to matters testamentary or matrimonial. Assuredly the District Courts have as a matter of fact discharged these duties for 28 years without issuing writs of *habeas corpus*, or at least with such rare and exceptional issues as to be of no weight in the argument. With regard to idiots and lunatics, it may be observed that by the Regulation of 1833 all the powers that had been possessed by the Provincial Courts are expressly vested in the District Courts; and by the 3rd section of the Rules of Court of 1st October 1833 (confirmed by Ordinance 8 of 1846), the District Courts are directed to exercise this branch of the jurisdiction according to Regulation 2 of 1829. That Regulation empowered the Provincial Judge to give notice to the persons in whose custody any supposed idiot or lunatic was, or if no one had been in custody to the constable or headman of the division, to produce the body of the supposed idiot or lunatic before the Court on a day appointed, and a summary punishment by fine or imprisonment is provided for

1861. Dec. 5.

disobedience of such order. We cannot see what need the District Court has for the further power of issuing writ of *habeas corpus* in these cases. With regard to its testamentary and matrimonial jurisdiction, how can it be said to be in such extreme need of the power of issuing a *habeas corpus* as to acquire the power by implication, when the ecclesiastical courts in England have for centuries administered justice in these departments of the law without possessing the power that is arrogated here. The truth is that when a suit has been instituted in the District Court on any subject within its jurisdiction, the Court can make its orders in that suit and can secure obedience to them. But what is asked now is a general power of issuing a high prerogative writ, and of summarily deciding the most important matters of personal right without any suit on the subject being before the District Court at all. If in the course of a suit or action in the District Court, any difficulty should arise curable only by the writ of *habeas corpus*, the writ can always be obtained from the Supreme Court or from one of its Judges. The analogy also of the right to issue writs of injunction tells directly against the present claim. The District Courts having an equitable jurisdiction can, as a necessary part of equitable process, grant injunctions in the suits before them, but it is well established that they cannot grant an injunction where no suit is pending. That general power can be exercised by the Supreme Court.

We have dealt with one by one the arguments that seem fairly to arise in support of the respondents' contention. Each singly proves unsatisfactory, nor when we look at them collectively and think over their cumulative force do they succeed in convincing us that the respondent is right, or in even making us think the existence or non-existence of the alleged power matter of doubt.

We are quite clear that the District Courts have it not. Were we to decide as desired by the respondent, we should decide that a court of criminal authority can issue process in the course of which it must deal with committals for offences expressly set out of and above its jurisdiction: and that an inferior court might by such process try the validity of committals by this, its Supreme Court. We should be giving this right to a mere local court that can only act and enfore its orders within its own limited area. Above all, we should be forgetful of all sound constitutional principles if we were to uphold the present proceeding. Once more let us remember (and Lord Mansfield's judgment in *King* v. *Cowle*, 2 Burrows, 834 may remind us) what in the eye of the law a proceeding by writ of *habeas corpus* is. The sovereign is supposed to be acting and inquiring why one of her subjects is deprived of his liberty. Here then we have an order of the District Court of Kandy before us by

1861. Dec. 5. — which the soverign is supposed to be acting and using one of Her highest prerogatives in an inferior and local court liable at any time to be coutrolled by *mandamus, procedendo or prohibitions* from this its Supreme Court and subject in all matters to the appellate jurisdiction of this the Supreme Court of this part of Her Majesty's dominions.

The validity of an order which must be based in such an hypothesis cannot be established by mere argument of inference, of implication or of convenience, even if such arguments in its favour were far stronger of their kind than can be suggested here.

Our unhesitating decision is that the District Courts of this Island possess no power to issue writs of, or in the nature of writs of, *h..beas corpus ad subjiciendum.*

The appeal is allowed and the order of the Court below is set aside.

1862.

27th February.

Present :—Sterling, J., and Temple, J.

C. R. Chavakachcheri, No. 864. } *Cander* v. *Seedavy.*

This case was remanded for a new trial, in these terms :— New trial.

The decision in this case not having been given for several months after the evidence, and the Court not having expressed a strong opinion of the strength of plaintiff's evidence, it would be more satisfactory to have the case reheard.

14th May.

Present :—Creasy, C. J., and Sterling, J.

P. C. Caltura, No. 26639. } *Fernando* v. *Fernando.*

This was charge under the toll Ordinance. On appeal preferred by the complainant, against an acquittal, *Rust* appeared for appellant. The Court affirmed the finding of the Court below, in these terms :— Toll—removal of bar—fine.

The toll-bar having been put up in a place different from that appointed by the Proclamation, no fine attaches.

D. C. Caltura, No. 17418. } *Perera* v. *Fernando* et al.

Dias for defendant appellant, *Lorenz* for plaintiff respondent, Appeal—notice of tender of security—Rule, sec. 8, cl. 3, (page 83).

The facts material to this appeal are sufficiently indicated in the following judgment of the Court :—

It appears on the proceedings that the District Court has disallowed the appeal because the defendant gave no notice to the plaintiff of the tendering of security in appeal.

1862. June 17. — The rule of Court, section 8, clause 3, does not require such notice in ordinary cases like the present, though notice is required by the 8th clause in the special case provided for by the 7th and 8th clauses.

In giving this decision the Supreme Court is anxious not to be understood as disapproving of the general practice which they are informed prevails in the District Court of directing the appellant to give notice, and refusing to accept his securities unless such notice has been given. It is the duty of the District Judge to be satisfied of the sufficiency of securities before they are accepted, and the District Judge may well be satisfied when the appellant has wilfully withheld the best possible means of having their sufficiency tested. But the present case, as it now comes before the Supreme Court, is not one where sureties have been refused for want of notice, but where although they have been accepted, the want of notice has afterwards been treated as a failure to comply with a statutory condition as to the right of appeal.

6th June.

Present:—Creasy, C. J., Sterling J., and Temple, J.

C. R. Matura, No. 14834. } *Aberam appu* v. *Sirreya.*

Dilatoriness—practice of adjourning cases

The Court in sending the case back for a re-trial, commented as follows on the dilatoriness of proceedings :—

The Supreme Court observes with very great regret the long and repeated delays in the proceedings in this case. A Court of Requests cause, which ought to be summarily and cheaply disposed of, is protracted over a period of nearly four years, and it is then determined in a manner which compels the Supreme Court to send it back again for trial.

Specially the Supreme Court notes with reprehension the practice of adjourning cases merely on account of the parties not being ready or of the absence of Proctors.

17th June.

Present :—Creasy, C. J., Sterling J., and Temple, J.

In re the application of Aysa Natchia for a writ of *habeas corpus.*

Habeaas corpus—custody of female child in the hands

The following is the order of the Court :—

This is a second application for a writ of *habeas corpus.* The first application was made by the petitioner Aysa Natchia to Mr. Justice Sterling. She then stated that she was the cousin of

1862. Jrne 17. — of a stranger —consent of relative &c.

Pattoo Muttoo, an orphan child of tender years, who had been unlawfully taken away from her, and who was detained from her by Don Cartalies Vidahn Aratchy.

On these statements a writ was granted. The parties appeared before the Court and the matter was carefully investigated.

It appeared that the mother of the child, a moorish woman, died in destitution and extreme misery while travelling along the Kandy Road, near the house of a Singhalese man, Don Cartalies Vidahn Aratchy, who is a person of good means and of great respectability. The child Pattoo Muttu, then a mere infant, was with its mother when the woman died ; and the little creature was left by the roadside utterly desolate and unprotected. Don Cartalies and his wife, from motives of the most laudable humanity, took the orphan child into their house, fed it, clothed it, educated it, and have maintained it with all the care and kindness that a parent could shew towards its own offspring. The present applicant and the Mahometan friends buried the dead mother, as they take care to inform this Court, and were perfectly aware of the condition in which the child was left, and of Don Carthalies taking it to his house. But none of them then claimed the child or offered to provide for it, or made any objection to its being taken by Don Carthalis. These things happened not some months ago, as is untruly asserted in the petition, but some years ago ; and during all that time no objection was made to the child remaining in Don Carthalis' family till the present year, when the child has nearly arrived at puberty, and is much above six years old, the age falsely assigned to it by the petitioner.

It further appeared that the petitioner is a person in abject and squalid poverty, utterly unable to maintain the child in comfort or even in sufficiency and decency.

Under these circumstances, Mr. Justice Sterling refused, and the Supreme Court considers rightly, to order the child to be delivered up to this applicant.

A petition was then presented by a number of moormen, in which they endeavoured to treat the matter as one affecting the credit and the religion of the Mahometan part of the population, and requested that they should have the child delivered up to them. This most improper and unwise petition was of course rejected, without the reprimand which the petition deserved, but they were kindly informed by Mr. Justice Sterling, that if the applicant Aysa Natchia thought herself aggrieved by his former decision, she should petition the full Court on its re-assembling, and that the subject should then be re-considered.

She has now petitioned accordingly, but the attempt to make the matter a question as to the social position and the religious feelings of the Mahometans generally is still persevered in ; and it

1862. June 17. is asserted that "until this child is restored to the petitioner or some one of her own nation or kindred, their tribe will remain degraded, their religion derided, and their society and respect most awfully degraded." Nothing could be more untrue or unwarrantable than these assertions and the insinuations which they are meant to convey, that the Judge of this Court, who refused to deliver up the child to the present applicant, was influenced in that refusal by the circumstance of the applicant and her friends being of Moorish race and holding the Mahometan creed.

Except in certain specified cases where we are bound to have regard to the religion of parties, because part of their customary laws, according to which they deal with one another, depends on their religion, we know here no distinction of persons, whatever may be their pedigree or their faith. All Her Majesty's subjects of every race, of every clime, of every creed are equal in the eye of the law. And with regard to the Moormen in particular, whatever cause the Moormen of Ceylon may have had in former ages to complain of the oppression or intolerance of the rulers of this island, there has not been the slightest ground for such complaint ever since Ceylon has been under the British Government. Nor does it become them or any of them to speak of themselves, as has been done in these proceedings, as a degraded tribe, when it is well known that, as a class, they are generally, and the court believes deservedly, respected on account of their intelligence and their industry and commercial energy. But the Supreme Court decides nothing here about Moors or Singhalese, about followers of Buddha or disciples of Islam. The Court decides that in any case where a child's relative has consented to that child being taken at a time of its extreme need by a person, who has maintained it, and is willing to continue to maintain it, with all proper kindness and in comfort and respectability, and when that relative after a long lapse of time comes forward, at a very suspicious period of a female child's, existence to claim possession of it, though utterly unable to maintain it, this court will not misuse the right of *habeas corpus* to take the child from a good and virtuous home and deliver it over to misery and want, probably to vice, and certainly to grievous temptations. The application is refused.

19th June.

1862. June 19.

Present :—Creasy C. J., Sterling, J. and Temple, J.

D. C. Galle, No. 17665. } *Andres* v. *Bastiana.*

D. C. Galle, No. 19934. } *Endris* v. *Dinto.*

Jurisdiction of District Court—restitution of conjugal rights.

The plaintiffs in these cases prayed for restitution of conjugal rights, in that defendants did " without just cause refuse to live and cohabit " with the plaintiffs, their husbands, and to render them the conjugal rights due.

The District Judge entered up judgment as prayed.

On appeal *Dias* for appellants, *Rust* for respondents. The Supreme Court set aside the judgments and dismissed the suits in these terms:—

These were suits for the restitution of conjugal rights ; and before examining the special facts and merits of each case, it became necessary to consider the general question whether a suit for the restitution of conjugal rights is maintainable in our courts

The counsel who argued in support of the jurisdiction referred the Supreme Court to cl. 24 of the Charter of 1833, to the supplemental Charter of 1843, and to the Ordinance No. 12 of 1843 as proving that the District Courts have jurisdiction in matrimonial suits. This was clearly established, but it at the same time was conceded that the matrimonial suits spoken of in the Charter and the Ordinance are such matrimonial suits only as were maintainable in Holland under the Roman Dutch Law.

The question was therefore narrowed down to an enquiry whether a suit for the restitution of conjugal rights was maintainable in the old Dutch Courts, and the hearing of these cases was purposely adjourned so as to give time for full and careful search among the records of our tribunals and among the Dutch juriss for authorities on the subject.

The Supreme Court feels assured that the learned counsel who argued in support of the jurisdiction has made that search with all possible deligence and sagacity; and the result is that not a single decision, precedent or dictum can be cited to shew that any suit of the kind is or ever was maintainable under the Roman Dutch Law. Those processes of the Ecclesiastical Law, which has existed some centuries, processes by which one party to an unhappy marriage exacts the compulsory cohabitation of a reluctant, and perhaps loathing, partner, are not such as this Court should be anxious or astute to introduce into this colony, though it should of

1862.
June 20.
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course have bowed to authorities, if authorities could have been found to prove that those things are part of our law. In the absence of all authority in favour of the jurisdiction, the Supreme Court holds that it does not exist, and that a suit for the restitution of conjugal rights is not maintainable in Ceylon.

20th June.

Present:—CRLASY, C. J., STERLING, J., and TEMPLE, J.

Appeal petition—false, scandalous and defamatory matter --professional misconduct of proctor—Duty of Judge as to reccording evidence.

In re G. W. Dharmaratne, a Proctor of the District Court of Caltura.

The following judgment of the Supreme Court sets out the facts of this matter :—

This was an appeal against a decision of the Commissioner of the Court of Requests of Pantura.

On hearing this appeal, the judgment was affirmed, but circumstances appeared in the petition of appeal, and in the report of the Commissioner, which made it necessary to enquire into the conduct of the Proctor and of the defendant in placing such allegations on the petition.

The material parts of the petition of appeal are as follows: "The appellant feels exceedingly sorry that he is constrained to remark to your lordships that the examination of the plaintiff was not properly recorded, that part of the respondents' examination which is most beneficial to the defence being entirely omitted. The appellant begs here to insert the very phrases that are wanting. The respondent, on being questioned as to the southernmost portion above alluded to, said that the whole land in question belonged to nine brothers; that Anthony Fernando, who is one of the said brothers, received the southernmost portion in gift from his brothers, that the southernmost portion was transferred over to him by his father-in-law the said Anthony Fernando, that no deed of gift accompanied the bill of sale in his favour, and that Anthony Fernando received no deed of gift from his brothers for the said portion of land. These two last phrases, with respect to the deed of gift, are entirely omitted to the great disadvantage of the appellant. That questions respecting the said deed of gift were put to the respondent, that they were answered by him, and that the particular attention of the Court was drawn to such answers, can be proved by affidavits if your lordships will deem such proof necessary."

"With due deference to the court below, the appellant begs to say that a certain title deed and a figure of survey, which he allowed the court to read, were improperly illegally and forcibly

withheld from him by the court, and they were filed in the case contrary to his wishes. Your lordships will further mark that this appellant had been served with no notice to produce either the survey or the title-deed." 1862. June 20.

Respecting these the commissioner reports as follows:—

"In forwarding the case No. 2668 of this Court, I have the honor to draw the attention of the Hon'ble the Judges to two deliberately untrue assertions made in the petition of appeal filed by the defendant. They occur in the 4th and 6th paras. of the petition.

"The first assertion is to the effect that certain statements made by the plaintiff are not recorded although the particular attention of the court was drawn to them. This is not true. No statement to which the attention of the court was drawn is omitted. The examination of the plaintiff was short, and every statement that appeared to the court to be at all relevant was taken down, whether attention was drawn to it or not. On looking over the record, I find several statements which are alleged to be omitted taken down in the form they were conveyed to the court. The fact that the southernmost portion of the land was transferred to the plaintiff by his father-in-law was repeatedly alluded to in the course of the trial. That there was no deed of gift in favour of the latter, or that the plaintiff knew of none was also admitted. The only points in issue in the case are what is the defined portion out of which the Fiscal sold $\frac{7}{8}$th, and what is the southern boundary? These being the issues raised, I do not see how a statement to the effect that the plaintiff's father-in-law had no deed of gift for the southernmost portion can be considered in the slightest degree material.

"But if when such statement was made, the defendant's Proctor had in any way called the attention of the court to it and expressed a wish to have it recorded, I would have gladly done so.

"The assertion in the 6th para. is a gross and palpable falsehood The title deed was of the defendant's own accord tendered to the court after the examination of his third and last witness, and when he was asked whether he had any other evidence to offer. He was distinctly questioned whether he wished to have the document read in evidence and a note made to that effect, and he said that he wished it to be so read. After the rising of the court, the chief clerk communicated to me the defendant's wish to have his deed back, and added that he was unable to return it until after the usual time for appeal had elapsed; and this was explained to the defendant.

"In connection with this remark, I may be permitted to observe that the defendant gave the Proctor on the opposite side a

1862. June 20. — great deal of trouble by not answering questions repeatedly put to him, and by evading others during the greater part of his examination, which occupied considerably more than an hour, and the impression left by him was certainly not a favourable one. Mr. Dharmaratne either on this account, or in consequence of a delicacy he may naturally have felt in conducting the defendant's case after having (very recently) as notary attested the two documents upon which the defendant claims, and with regard to which the plaintiff suggested that they were not bona fide deeds but got up for the purposes of this case, declined to appear for the defendant during the remainder of the trial against the express wish of the court.

"Although the defendant alone signs the appeal petition, I am fully satisfied with that it was drawn out by his Proctor Mr. Dharmaratne. It appears to me strange that a member of the legal profession should be so unscrupulous as to make assertions which he knows to be untrue, and that he should attempt to evade the responsibility by throwing it on his misguided client.

"I trust such notice will be taken of this matter by the Supreme Court as will effectually prevent the recurrence of similar conduct, and impress on Mr. Dharmaratne the necessity of having a greater regard for truth."

As it was intimated to us by the counsel for the appellant that the Proctor would not dispute or conceal the fact of his having drawn the appeal, we caused the Proctor to appear before us, in the first instance, at chambers, on the 12th of this month.

He was cautioned that he might decline to answer any question, the answer to which might criminate him, and after that caution he admitted that he drew the appeal.

His explanation as to the charges against the commissioner contained in the 4th para. of unfairly suppressing evidence favourable to the defendant, although the particular attention of the Court was drawn to them, was that he, the Proctor, repeated the words of the witness, and that he (the Proctor) considers this to be a drawing the attention of the commissioner to it.

With regard to the 6th para of the appeal petition which charges the commissioner with having improperly obtained and withheld from the defendant certain documents, the Proctor stated that he the Proctor had left the Court before this part of the proceedings, and that he drew this part of the petition on the instruction and representations of his client. He added that he took no pains to ascertain the truth of these representations, he (the Proctor) being then sick, and the time for appeal nearly out.

He produced before us among other affidavits one by the defendant.

"C. Joseph Fernando maketh oath and saith that he is the

defendant in case *C. R. Pantura 2668*, and after Mr. Dharmaratne, who appeared for the deponent, declined conducting the defence, and left the Court, the presiding commissioner wished to read a certain title-deed and a figure of survey that were in the possession of the deponent, who accordingly allowed him to read them. 1862. June 20.

"The deponent further saith that he did not mean to file them in the case, nor did he move that they be filed, but the commissioner aforesaid very improperly withheld them from him and filed them in the case against his wish.

"The deponent further saith that he made repeated applications then and there for the said title deed and the figure of survey, but the said commissioner would not return them." And he stated that he drew that affidavit.

It now became necessary for us to have the defendant before this Court, and accordingly he was directed to appear to-day.

Meanwhile the substance of the proceedings of the 12th June were communicated to the commissioner, and he has sent the following further report on the matter :—

"With reference to the explanation of Mr. Dharmaratne that he repeated certain statements to the Court after the Interpreter, I have to observe that this is frequently done by Proctors during the examination of parties and witnesses, without any wish that what they repeat should be recorded. Whether in this instance, Mr. Dharmaratne repeated the words of the Interpreter I do not know, but I am sure that the attention of the Court was not pointedly drawn to the statements. Mr. Dharmaratne left the Court before the document referred to was handed in by the defendant. Whether the statements regarding it were made on the authority of the defendant, or whether they originated with his Proctor I cannot take upon myself to say."

Two matters arise here for consideration. Did the Proctor insert a wilfully false statement in the petition of appeal, that the commissioner omitted to record material portions of evidence to which the particular attention of the Court had been drawn?

The materiality of this evidence may be matter of doubt. The Proctor may have sincerely, though erroneously, thought it material ; and the Judge may have similarly sincerely, though erroneously, have thought it irrelevant. It is a mere vulgar error that a Judge is bound to write down all that is asked by advocates and all that is said by witnesses. I use the words of Lord Denman in saying that it is the duty of the Judge to take down only that which is material and relevant. Ofcourse nothing should be omitted that is even likely to be material and relevant, and almost every Judge would take care to make a note of a particular statement, if distinctly requested to do so by the advocate, unless indeed that advocate had previously abused the confidence of the

1862. June 20. — Judge in the honor of the advocate and in the advocate's implied assurance that the matter which then appeared irrelevant would ultimately prove relevant and important.

Did the Proctor on this occasion, as he asserts in the petition, particularly draw the attention of the court to such answers ?

This is a most unsatisfactory explanation of the Proctor which he now gives, when he, says that he the Proctor, repeated the answers. The habit of Advocates repeating the answers of witnesses is too common, and it is done by many of them whether the evidence is important or trifling. It is frequently a habit acquired by those who wish to spin out their examination or cross-examination, and who are not sharpwitted enough to follow up one question rapidly by another: while repeating one answer, they are really thinking over the next question. It is a habit which the best English Judges have often censured, and which one very eminent circuit Judge, the late Baron Guerney, never would allow. I never should suppose that the repetition of an answer by an advocate was equivalent to a request to me to note it down ; and it is difficult to believe here any member of the profession could so consider it. But it is barely possible that Mr. Dharmaratne may have thought so ; and on this part of the matter, we would not decidedly condemn him of wilful falsehood in the petition which he drew, though he is still guilty of gross misconduct in having preferred such a heavy charge against the Judge of the Court in which he is a practitioner, on such very slight and frivolous grounds about his own mistaken fancy as to the natural effect of the repetition of a witness's answer.

We now come to the charge of falsely and wilfully asserting in the petition that the commissioner obtained possession of documents from the defendant unfairly, used the documents improperly, and detained than wrongfully.

The gross untruth of the assertions is clear. But we have to find out with whom the blame rests of having placed such scandalous, false, and defamatory matter on the proceedings of Court. Does the blame rest with the Proctor, the defendant, or with both ? We think it clear that the Proctor was not in Court when the documents were voluntarily produced by the defendant, and read in evidence at the defendant's express request ; but the defendant, who certainly has told us an untruth to-day, may have told his Proctor an untruth upon the matter, when he went to his Proctor to get the petition of appeal drawn. But it does not appear that the Proctor took the trouble to enquire into the matter, which he ought to have done before he drew up such a charge. He has used before us an affidavit, which he admits that he, the Proctor, drew, in which the defendant asserts that he did not mean these documents to be filed. We have no doubt that

this affidavit correctly represents what the defendant told his Proctor on the subject ; but whatever the ignorance of the defendant may have been as to the meaning of filing documents in a case, the Proctor must have known the meaning of those terms, and ought not to have drawn up such a petition without careful enquiry, not only from the defendant, but from others, whether the defendant had or had not consented to the documents being read in evidence. The record itself shews that the defendant moved that the documents should be read. If the Proctor was too ill to make enquiry, he ought not to have drawn up such a petition, especially as there was another Proctor who had acted in the case. Taking the most lenient possible view of the case as affects Mr. Dharmaratne, we consider he has been guilty of gross and culpable professional misconduct and mark our disapprobation of that misconduct by suspending him from being, or acting as, a proctor for the term of one calendar month from this date.

1862. June 26.

With regard to the defendant, C. Joseph Fernando, whatever may be his ignorance of technical proceedings in Court, we consider he has been guilty of wilful and malicious falsehood in concealing and denying the fact that he was asked whether he wished to have the documents in question read in evidence, and that it was read in evidence at his express desire. We consider that in presenting to the Supreme Court a petition containing the wilfully false, scandalous and defamatory charges contained in the 6th para., he has been guilty of a contempt of this Court, and we sentence him for that contempt to pay a fine of £2 (two pounds), or in default to be committed to the gaol of Colombo for a term of one week.

26th June.

Present :—CREASY, C. J., STERLING, J. and TEMPLE, J.

D. C. Kandy, No. 33585. — *In re* Petition of appeal of Basenaike Nilema, defendant in the said case.

Petition of appeal—scandalous and defamatory matter.

The following order of Court is explicit as to the facts of this matter :—

We have each of us carefully examined the petition of appeal in this case, the District Court Judge's letter respecting it, and the proceedings at the trial, not with the view of forming any opinion on the merits, which would be premature and improper, but in order to ascertain whether the petition of appeal, or any part of it, is so scandalous, defamatory or impertinent as to make it unfit to remain in the proceedings. We all concur regretting the

1862. June, 26. — general tone of the petition, sanctioned as it is by the names of a Proctor and two Advocates. We also concur in considering that there is one passage in the petition so scandalous and defamatory that it cannot be allowed to stand.

With respect to the mode of dealing with the rest of the petition, there has been considerable diversity of opinion among us, but we have ultimately agreed to follow the mildest course that any of us has thought sufficient.

The sentence specially referred to and complained of by the District Judge occurs at the end of the following passage:—

"The District Court has declared that it cannot believe the execution of this deed, because she (that is, the plaintiff) did not object, though left utterly destitute. From what part of the evidence the District Judge discovered this, your humble appellants is at loss to discover. Not one word was uttered at the trial, and your appellant cannot conceive how the District Judge came to state as a fact that which is well-known to be untrue."

The last sentence of this part of the appeal is in every sense of the term scandalous and defamatory. We hope the drawers and signers of this petition did not mean to impute wilful untruth to the District Court Judge, and we have given them the benefit of that hope. But such language, however it may be interpreted, is grossly improper.

Had the District Court Judge been in error in this matter, and had it been necessary for the petitioner to point out that error to the Supreme Court specifically, that might have been done in proper language. But the evidence shews quite enough to warrant that remark of the learned Judge, of the value of which remark we here decide nothing, but which ought not to have been the subject in the petition of such grossly offensive comment.

We direct that the words "and your appellant cannot conceive how the District Court came to state as a fact that which iswell-known to be untrue," be expunged by the Registrar from the petition of appeal as scandalous and defamatory and unfit to remain on the proceedings of the Court. With regard to the petition generally, our present intention is to deal with it, if the result of the case make it necessary, under the 3rd clause of the rules of Court of the 12th of December 1843.

3rd July.

1862. July 3.

Present:—CREASY, C. J., STERLING, J., and TEMPLE, J.

D. C. Galle, No. 20,283. } *Black* v. *Rose*.

D. C. Galle, No. 20,286. } *Rose* v. *Black*.

Shipping—delivery of goods over ship's side—payment of freight—demurrage—interest.

The facts are sufficiently indicated in the following judgment of the Supreme Court :—

These were cross-actions between a shipowner and a merchant, and the main point in dispute was whether the shipowner was entitled to require payment of freight as the goods were delivered into the merchant's boats over the ship's side, or whether he was bound to deliver the whole cargo into the boats and wait till it was brought on shore, before he had his freight.

The merchant had by a charter-party dated 16th April, 1861, chartered the ship to fetch a cargo of rice from Calcutta to Colombo to be unladen there or at Galle, or part at each place, according to instructions. The dispute arose as to the part which (as was agreed) the ship was to deliver at Galle. The parts of the charter-party material for the decision of these cases are as follows:

"Freight to be paid at and after the rate of one rupee and four annas per bag of rice of two maunds and light freight at £ 2.10 per ton as per Calcutta scales of tonnage on the quantity safely delivered. Twelve working days for loading in Calcutta, and fifteen working days for discharging at Galle or Colombo, including both places, but exclusive of time occupied in changing ports to commence from the time the master gives notice that he is ready to receive and discharge cargo, or demurrage to be paid at £ 20 per day for every day over and above the said working days. The cargo to be taken alongside and to be taken from the ship's tackle at the port of discharge free of risk and expense to the ship."

The ship delivered part of her cargo at Colombo, and then proceeded to Galle by instructions to deliver the residue. Various quarrels took place between the parties into which it is unnecessary to enter, but at last after some cargo had been delivered, the master required the merchant to pay daily the freight for the amount of cargo delivered each day over the ship's side into the merchants boats, and refused to deliver more cargo on the merchant's refusing to pay on delivery as required. The question is, was the master justified in such requirement and refusal. The Supreme Court think that he was.

As a general principle, when there is no express stipulation as

1862. July, 3. — to the time and manner of payment of freight, the master is not bound to part with the goods until his freight is paid. This is expressly laid down in *Abbott* on Shipping, the highest authority on the subject, and the same doctrine in laid down in perhaps the next highest authority, Kent's Commentaries, vol. 3. p. 299.

It was urged on behalf of the merchant in this case that where the mode and time of paying freight are left uncertain by the contract, the custom of the port of delivery is to prevail; and some evidence, though very feeble, was given that it is not usual at Galle to pay freight till the whole cargo is brought on shore. Smith's Mercantile Law was cited on this point. His words are "the manner of delivery of the goods, and consequently the period at which the master ceases to be responsible for them, depends, in the absence of agreement, on the custom of the place." Mr. Smith cites a case from Espinassé, which by no means bears out his text; but even if it did, that text has no application here. In this case, the charterparty provides that "the cargo is to be taken alongside and to be taken from the ship's tackle at the port of discharge free of risk and expense to the ship." And the bills of lading provide that the cargo is to be taken from the ship's tackle, at the risk and expense of the consignee and a receipt to be granted on board. It is further in evidence, that an agent of the merchant's was on board of the vessel during the days on which the delivery went on, and that he gave receipts, though the form of those receipts does not appear on the face of the proceedings before us. The Supreme Court thinks it clear that in this case, it was intended that the master should deliver, and the merchant receive, at the ship's side; that on such delivery and receipt, the master ceased to be responsible for the goods. It is clear on all authority and common sense that he had a right to be paid before he gave up his lien.

It has been said on the other side, that it was impossible for the merchant to examine the condition and weight of the bags of rice as they came out of the ship.

No evidence was given of this. The contrary would appear to have been the case, from the fact of the merchant having for several days before the quarrel sent his agent on board to superintend the delivery and acceptance of the cargo from the ship into the boats; and even if there had been any difficulty of the kind, it was one which the merchant brought upon himself by the mode in which he contracted.

As the Supreme Court holds that the merchant's refusal to pay on delivery was wrongful, it must hold that his omission to unload and receive the cargo on the proper term was wrongful also, and that the part of the judgment of the Court below which fixes him with demurrage is correct. Objection has been made to that part of the judgment which gives interest on the dumurrage, and

it is argued that demurrage is in the nature of damages, so that interest is not to be given on it. The Supreme Court thinks that this objection is well founded. 1862. July 15.

The verdict in the case of ***Rose*** v. ***Black*** is therefore to be reduced by disallowing the interest on the demurrage. In other respects, the judgment of the District Court in both actions are affirmed.

15th July.

Present :—Creasy, C. J., Sterling, J. and Temple, J.

D. C. Badulla, No. 15471. } *Kourale* v. *Dingery Menica* et al.

The Supreme Court in remanding the case for re-hearing said :— *Mesne* profits.

A party may sue for mesne profits even though in a former suit for the land he declared for mesne profits, but gave no evidence thereon. But he can only recover under the 9th clause of Ordinance No. 8 of 1834. See District Court Badulla 14674. Supreme Court C. M. 27th May 1857.

D. C. Kurunegala, No. 15830. } *Wieretoonge* v. *Sinneperumal Chelly.*

Per curiam :—Affirmed. The Supreme Court regret to observe the frequency of appeals about the right to begin and the order in which parties are to call evidence. These and all similar matters as to the conduct of a cause are things in which the presiding Judge ought to be invested with very large discretionary powers ; and the Supreme Court will not interfere with the mode in which those discretionary powers have been exercised, except in cases of gross error and of serious hardship arising from such error. Right to begin—appeal—discretion of presiding Judge.

18th July.

Present :—Creasy, C. J., Sterling, J. and Temple, J.

P. C. Negombo, No. 203. } *Livera* v. *Silva.*

On appeal against an acquittal, the Court affirmed the order, as follows :— Toll, evasion of—cl. 7 of Ord. 22 of 1861, [cl. 17 of Ord. 4 of 1867.]

The toll keeper [who is the complainant] seems to entirely misunderstand the 17th clause of Ordinance 22 of 1861. The

1862. July 22. — words "not being a public highway" are to be read in conjunction with the word "land," and not with the word "road," which means here the turnpike road itself.

The clause is intended to prevent the evasion of payment of toll by a trick, which is doubtless as common here as in England. A man who has used a turnpike road tries to avoid paying toll, by turning off the turnpike road when he gets near the toll-gate and skulking round the toll-station till he he can get back at the turnpike road on the other side of the toll-bar. For this he is very properly made liable to a fine. If there is a public highway running out of the turnpike road, a traveller may turn off into that public highway without being liable ; but if he shirks the toll, by turning off the turnpike road over any adjacent land, not being the soil of a public highway, he is liable to the penalty.

22nd, July.

Present:—Creasy, C. J., Sterling, J., and Temple, J.

D. C. Colombo, No. 29370. } *Hadji Marikar* v. *Ahamado Lebbe.*

C. R. Colombo, No. 9370. } *Ama Lebbe* v. *Mamona Lebbe.*

Mahometan Law—custody of child—liability of father to maintain it.

The following is the judgment of the Supreme Court :—

The Supreme Court thinks that the plaintiffs in both these actions are entitled to succeed. With respect to the law, the Supreme Court think,

1. that the grandmother of a Mahometan child is entitled to the custody of the child on the mother's death ; and

2. that the obligation of providing for the child's maintenance is paramount on the father, although the grandmother has the child in her custody, and although the father wishes to have the child in his own.

The right of the grandmother to the custody of the child is given on the child's behalf, not on behalf of the grandmother. It is the child's privilege. The remark therefore of the learned Commissioner in the Court of Requests case, about those who chose to exercise a privilege being bound to take it with its accompanying burden, seems to the Supreme Court inapplicable here.

Some difficulty arose in the District Court from the action being brought, not by the grandmother, but by the uncle, who in fact lived in the house with the grandmother and the child, and provided the necessary funds. That difficulty disappears when the

case is considered thus. The plaintiff (uncle) finds the child in the proper place for the child to be in, i. e., in its grandmother's custody. The plaintiff, as the child wants necessaries, provides them. The plaintiff turns to his father, who is under the paramount duty of maintaining his child so supported, to repay him. The Supreme Court think he has a right to do so, and that there is sufficient *quasi obligatio ex contractu* to make an action sustainable. 1862. August 5.

In the District Court case, the Supreme Court thinks that no deduction should be made on account of the alleged receipt by plaintiff of the profits of the house which belongs to the child. In the words of the Mahometan authority which has been cited : " the money of the little child should not be expended, but kept till it comes of age."

5th August.

Present:—CREASY C. J. and TEMPLE J.

D. C. Jaffna, No. 11493. — *Lindsay* v. *Dunlop.*

The Supreme Court remanded the case in these terms:— Evidence—Right to begin—*onus*—appeal.

The District Judge ought not to have made an order as to the right to begin, and then suspended the proceedings to remit an appeal against such order.

In order to prevent a second appeal as to the right to begin in this suit, the Supreme Court wish to draw the attention of the District Judge to a case reported in Austin's Rep p. 200, in which the effect of admissions in examinations and the proper course to take as to the order of proof are very fully explained.

D. C. Negombo, No 419. — *Caloo Naide* v. *Perera*

The Court, in setting aside the judgment appealed against, said,– Prescription.

The notes as to prescription are admirably laid down by Chief Justice Serjeant Rough in a judgment given in D. C. *Caltura 2839* : " There are," says he, "two points regarding the law of prescription that should be always well borne in mind : the first, that a possessor is always presumed to hold in his own right and as proprietor until the contrary be demonstrated. The second that the contrary being once established, and it being shown that

1862. August, 14. — the possession commenced by virtue of some other title, such as that of tenant or planter, then the possessor is presumed to have continued to hold on the same terms, until he distinctly proves that his title has been changed."

14th August.

Present:—CREASY, C. J. and TEMPLE, J.,

C. R. Harispattoo, No. 2,477. *Odapalate Korle* v. *Palle Aratchy.*

The following judgment of the Supreme Court sets out the facts of the case :—

Kandyan territory—headman's lands—Proclamation of 21st Nov. 1818, cl. 23.

In this case the defendant was sued for land tax on certain lands within the Kandyan territory. The defendant pleaded his exemption as a headman. It appeared that he was headman for a district in which these lands are situate.

The question was whether the exemption given by the Proclamation of 21st November 1818, extends to all lands (at least, to all lands in the Kandyan territory) whereof a headman is possessed; or only to his lands in that district for which he is appointed headman.

The words of the clause in question (§ 23.) are as follows: " all lands belonging to chiefs holding office, either of the superior or inferior class, and of inferior headman, shall during the time they are in office be free of duty."

Does this mean that a personal immunity from taxation, so far as land tax is concerned, shall be granted to chiefs and headman, while in office? Or does it mean, not that all their lands shall be free, but only such lands as be in the district for which they serve.

We think that the first of these interpretations is correct.

The words of the Ordinance are that " *all* lands belonging to chiefs &c." shall be free. There is nothing in the context to curtail the force of the words " all lands," and we must give them their natural construction. This opinion is confirmed by looking at the 28th and 29th clauses, which seem clearly to treat the immunity from taxation given to the chiefs as a personal immunity and not as an immunity given to the lands which they hold in the district where they bear office.

The 23rd section evidently means to treat chiefs and headman on the same principle as to relief from land tax; and therefore any argument deduced from other parts of the Ordinance in favour of the extended immunity of the chiefs applies in favour of the headman as to the point now before us.

We were referred to clause 1 of Ordinance No. 14 of 1840 as making all lands liable to land tax. But that clause only "continues the levy upon lands then liable thereto, as by law custom or usage was then levied or payable." But Kandyan Headmen's lands being then exempt were clearly not within the meaning of that clause.

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The judgment of the Court below will be accordingly set aside, and judgment entered for defendant with costs.

D. C. Galle, No. 9501.

O'Grady v. Jansz.

Forfeiture of recognizance—levy under warrant of Distress—Ord. No. 6 of 1855, cl. 14—procedure.

The facts are sufficiently stated in the following judgment of the Supreme Court.

Dias appeared for appellants, the *Queen's Advocate* for respondent.

In this case one E. A. Jansz gave bail to appear before the District Court of Galle to take his trial for assault. The appellants, Anthony and Scheffer, were his securities under the bail-bond. Jansz did not appear on the summons to take his trial, and on the motion of the counsel for the prosecution, the District Court ordered the recognizance to be forfeited under the 29th clause of Ordinance No. 5 of 1855; and at the same time, on the motion of the D. Q. Advocate, a summons was ordered to issue to Jansz and his securities under the 11 clause of Ordinance No. 6 of 1855 to shew cause why the sums acknowledged in the bail-bond should not be levied on their goods &c. To this summons, Jansz was reported not to be found, and on the 9th June the sureties, appearing by counsel, shewed cause. The District Court however ordered the amount of the recognizance to be paid into Court, and in default warrants of distress to issue under the 11 clause of Ordinance 6 of 1855.

Against this order the securities have appealed, and the following objections have been urged by their counsel. (1) That the commission of Justice of the Peace given to Mr. Fraser in 1853, and under which he acted, was impliedly revoked by the subsequent temporary commission given to him in 1861 under the Ordinance No. 3 of 1853; (2) That the original recognizance was not sent to the Fiscal by the Justice of the Peace, as required by the 25th clause of Ordinance 5 of 1855. (3) There is no evidence that the certificate of non-appearance was endorsed on the recognizance, as required by clause 10 of Ordinance 6 of 1855. (4) There is no evidence that Jansz was absent when called in Court.

1862. August 14. — As to the first objection, there is no evidence that the commission given to Mr. Fraser in 1853 was ever formally revoked, and text of Chitty on Prerogatives p 89, 90, cited by the appellant, does not bear out the allegation that it was revoked by implication. As to the 2nd objection, there is no conclusive evidence that the original recognizance was not sent by the Justice, and as it was produced before the District Court, it is to be presumed it was regularly transmitted ; neither does it appear how the sureties will suffer, if the fact were otherwise. As to the 3rd objection, this endorsement is to be made under the 10th clause of Ordinance 6 of 1855 by the Registrar or other proper officer of the court. Now both the recognizance and the certificate are before the court properly, and the certificate is to be considered the act of court, and thereupon required no proof. As to the 4th objection, the entry of non-appearance by the Judge of the court is prima facie evidence of absence, and such entry being a record of the District Court would be properly judicially noticed by it in its subsequent proceedings.

Affirmed.

D. C. Colombo, No. 29669. } *Marshall et al* v. *Edermanesingham, Lee, applicant & appellant,* and *Sinnaya Chetty, opponent & respondent.*

Mortgage—priority—effect of creditor paying off a more ancient creditor—advances for cultivation of estate—prior special mortgage—preference.

The following judgment of Lawson D. J., sets out the facts of the case :—

" This is a proceeding brought to determine the respective rights and priorities of the mortgagees of an estate, called the Koodoogalle estate, sold under the judgment obtained in this case against defendant Edermanesingham.

" It appears that Edermanesingham purchased this estate from Martin and Marshall for a sum of £10,000. Credit was given by the vendors for £6,000 part of the purchase money ; and on the 23rd October 1857 a bond in a penal sum of £12,000 was given by Edermanesingham to Martin and Marshall, to secure the payment of this sum by five instalments annually of £1,200 each, payable on 1st January in each year, commencing from 1859 until payment in full with interest @ 7 o/o ; and for further security a mortgage of the estate was given to them. On the 23rd December 1858, the defendant executed a second mortgage of the estate for £1,000 with interest @ 15 o/o in favour of Sinnaya Chetty ; and again on the 15th August 1859, he executed a further mortgage of the same land in favour of Sinnaya Chetty, for a sum of £2,000.

" The first instalment of £1200 was paid when it became due,

and before the second instalment became due, Edermanesingham entered into an arrangement with W. D. Lee, by which the latter agreed to pay that instalment, and to make advances to carry on the cultivation of the estate, and to secure these sums Edermanesingham on the 24th December 1859 gave Lee a further mortgage on the estate. 1862. August 14.

"Lee had no notice of either of the mortgages to Sinnaya Chetty; and Edermanesingham in the mortgage deed to Lee expressly declared that the estate was subject only to Martin and Marshall's claim, and that there was no other incumbrance on it; by the same deed, Edermanesingham appointed Lee his agent and factor for the estate with authority to visit and power to appoint, dismiss and pay the superintendents. On the 5th January 1860, Lee paid to Martin and Marshall's agent the instalment of £1200 then due, with a further sum of £336, being interest @ 7 o/o on £4800 for the previous year; but, believing in consequence of the fraud practised on him by Edermanesingham that his own mortgage ranked next to that of Martin and Marshall, he took no assignment of their claim against the estate. Immediately after the arrangement with Lee was made, he was put in possession of the estate, and thereupon removed the superintendent and appointed a fresh one, until the sale in June last, hereafter to be referred to. Lee also provided the necessary funds for the cultivation of the estate.

"After the instalment of 1861 became due, Lee discovered the fraud which had been practised on him by Edermanesingham, and thereupon obtained an assignment from Martin and Marshall of their claim against Edermanesingam under their mortgage to the extent of £1536, but subject to their own claim to the residue of the purchase money, viz. £3600 and interest thereon then remaining due as a prior claim.

"On the 25th March 1861, Martin and Marshall obtained judgment against Edermanesingam for the £3600 due in respect of their mortgage bond. Under this judgment a writ was issued and the estate was advertised for sale; but the sale was afterwards stopped by Sinnaya Chetty, who shortly afterwards purchased the judgment and mortgage bond of Martin and Marshall for £3852 12*s* 6*d*., and took an assignment of their interest by deed dated 18th April, 1861, under which he was also appointed their agent for the purpose of recovering this sum. A fresh writ was thereupon issued, and the estate was put up for sale and purchased by Sinnaya Chetty for £7500. Lee thereupon claimed a sum of £3157. 2. 7, as due to him under his mortgage on account of the payment by him of the sum of £1536, and of his advances for the upkeep of the estate, and refused to give up possession, in consequence of which claims Sinnaya Chetty paid into court this sum of £3157. 2. 7, and Lee delivered over possession of the estate, on

1862. August 14. receiving an undertaking from the Proctor of Sinnaya Chetty that his claim should not be thereby prejudiced.

"Lee now applies to be allowed eredit for this sum of £3157. 2. 7, as a charge on the estate, subject indeed to the claim of Sinnaya Chetty for the sum of £3600 and interest due to him under assignment of the mortgage and judgment from Martin and Marshall, but preferent to the mortgages for £1000 and £2000 of the 23rd December 1858, and of the 15th August 1859.

"Lee obtained judgment on the 21st May last againts Edermanesingham for £1536 due on his mortgage and assignment from Martin and Marshall, and for £889. 10. 6. for the balance due on account of advances up to the 25th April 1861. He has tendered the estate accounts for inspection of the court, and the court is satisfied that this sum was due on that date on account of such advances, and that there is a further sum due for his expenditure up to the 11th of July when he gave over possession.

"The question is, whether Lee has a claim on the proceeds of the sale of the estate for these sums or either of them, before payment to Sinnaya Chetty of the sums due to him in respect of his mortgages.

"It is not contended on the part of Lee that Sinnaya Chetty participated in the fraud practised by Edermanesingham; nor on the other hand, is it argued that Lee was guilty of any negligence or default in not having ascertained the existence of the mortgages to Sinnaya Chetty before making advances on the estate. The claimants therefore come before the court with equal equities, and the maxim *qui prior est tempore potior est jure* will apply except in so far as any claim may be proved to be privileged. Now on behalf of Lee it has been contended that having paid off the debt of Martin and Marshall to the extent of £1536, he has succeeded to their rights in respect of that sum under their mortgage, both by virtue of the assignment from them, and also, irrespective of that assignment, on the ground that a creditor who pays off a more ancient creditor than himself succeeds to the mortgage of that creditor. And it is further contended that Lee is entitled to priority in respect of his advances towards the estate, because the value of the estate has been enhanced to an equivalent extent by the expenditure, and that such expenditure creates a tacit hypothec, having preference over a previous special hypothec; and also Lee, having been in possession of the estate at the time of the sale, was entitled to retain possession until his expenditure on the estate was repaid him, and that, by agreement between the parties, his surrender of the estate was not to prejudice his rights.

"Each of these points has been very fully urged at the bar, and the Court will proceed to consider them in the order in which they have been stated.

"1st. *Whether anything passed by the assignment from Martin and Marshall to Lee?* 1862. August 14.

"On this point, the Court is of opinion that Martin and Marshall's debt was extinguished and satisfied to the extent of the £ 1536 by the payment of that sum to them by Lee, and that there was no agreement between them and Lee at the time of the payment for a subsequent assignment, such assignment, made in pursuance of an agreement entered into some time after the payment, is void (Sande *de actionum cessione*, cap. vii. sec. 1.)

"2ndly. *Whether, independently of the assignment, Lee acquired the rights of the prior mortgagees by the payment of their claim.*

"In support of the affirmative of this proposition, the authority of Domat is quoted to the following effect:—

'He who being already a creditor pays off another creditor of the same debtor, who is prior to himself, succeeds to his mortgage, although he have made no such agreement, nor received any substitution. For his quality of creditor makes it to be presumed that he pays him who is the more ancient creditor with no other view than that he may succeed in his place and thereby secure his own debt, which distinguishes his condition from him who, having no such interest, pays for the debtor without substitution, and of whom it may be said that perhaps he was under an obligation to the debtor to pay for him.'

"This authority appears to the Court inapplicable to the present case for the following reasons:

"*(a.)* At the time when Lee paid the sum of £1536 to Martin and Marshall, he was not a creditor of Edermanesingham, but had only received a mortgage to cover future payments, of which this sum appears to have been the first.

"*(b.)* It appears from the passage cited that where there is a presumption that the person paying was under an obligation to the debtor to do so, that presumption will rebut the presumption of an intent on the part of the payer to succeed to the rights of the prior creditor; *a fortiori* therefore will the latter presumption be rebutted by actual proof of such obligation on the part of the payer. Now in the present case, Lee was bound by the agreement with Edermanesingham, recited in the deed of the 24th December 1859, to pay to Edermanesingham the sum of £ 1500, which at the request of the latter he paid to Martin and Marshall.

"*(c.)* The assignment of a mortgage of landed property, being a contract for establishing an interest in such property, must under the provisions of Ordinance 7 of 1840 be effected by notarial instrument.

"The Court therefore in the absence of such evidence is precluded from presuming such assignment to have been made from

1862. August 14. — the acts of the parties or the circumstances of the case; and this is not the case of a tacit hypothec created by operation of law, which, as has often been held, is not excluded by the operation of the Ordinance, but a case of the assignment of a conventional hypothec by the persons entitled thereto, which falls under the provisions of the Ordinance as fully as the original hypothecation itself.

"*(d.)* Lee having elected to take from the debtor a special mortgage to secure his advance, he cannot therefore be presumed to have intended to take an assignment which would have rendered such a mortgage unnecessary; and though Lee neglected to take this assignment in consequence of the fraud of Edermanesingham, this cannot prejudice Sinnaya Chetty who was no party to the fraud.

"Before leaving this question as to the effect of payment of a prior debt in transferring to the payer the right of the former debtor, it is necessary to consider the decision of the Supreme Court in case No. 14008 from the District Court of Galle *(Lorenz 120)*, which was cited as an application of the principle relied on. In that case, the defendant, who was indebted to two others, to the one on a special mortgage of land, and to the other, the plaintiff in the case, as it would appear, on simple contract, sold and transferred the mortgaged property to another, who gave the mortgage creditor his own bond for his debt. Shortly afterwards, the plaintiff obtained judgment and seized the land which was claimed by the transferee. The Court held that the transfer was fraudulent and illusive, as intended to defeat the claim of the plaintiff, and accordingly set aside the transfer, but held the claimant entitled to be paid the amount of the mortgage debt as a preferent claim. The reasons of the judgment are not stated in the report, but it appears that the property seized was vested in the claimant and that the plaintiff could not justly set aside the transfer on the ground of fraud without paying to the claimant the money bona fide expended by him or for which he had rendered himself responsible in paying or settling a claim preferent to that of the plaintiff.

"The Court therefore holds that Lee is not entitled to rank before Sinnaya Chetty with respect to the claim for £1536.

"3rdly. We have next to consider *whether advances for the cultivation of the estate give, in so far as they have enhanced its value, a preferent claim to the person making the advances over a prior creditor under a special mortgage;* and this point must be considered first without reference to any rights which Lee may have acquired by virtue of his possession of the property, which will be considered separately. The point now in question was considered by this court in the case No. 22317, and a decision was

given unfavourable to the claim of a person who had spent his money in the improvement and plantation of a garden even as a mortgagee holding a special mortgage considerably subsequent in date to the agreement under which the plaintiff commenced his improvements. The case however is cited by the counsel for Lee on the ground that the decision of the court on this point was reversed by the Supreme Court. On reference to this case, it appears to the court that though its judgment was altered and modified by the Supreme Court, the alteration was in substance an affirmation of its decision on the point now in question. In that case, the plaintiff was the planter of a cocoanut garden belonging to the first defendant, which was sold under a writ of the 2nd defendant, who held a special mortgage from the first, of date subsequent to the agreement under which the plaintiff commenced to plant. The plaintiff claimed the amount expended by him in the plantation out of the proceeds of the sale of the estate, and this Court, holding that the expenditure gave him no such preferent claim, dismissed the case. The Supreme Court set aside this judgment, but confirmed the non-suit as against second defendant, holding that the plaintiff not having completed his contract to plant might hold possession, until it was completed, and might then have his remedy against the owner of the land for the time being. By this decree the 2nd defendant was allowed his costs against plaintiff. The effect of this judgment therefore is to allow the special mortgagee to rank before a claimant who had expended money in the improvement of the land, even where the mortgage is of later date than the exdependiture; *a fortiori* therefore must a special mortgagee be allowed preference over one who has commenced his improvements after the date of the mortgage, and if the Court is right in considering the judgment of the Supreme Court as an affirmal of its former decision, it is not now competent for it to re-open the question.

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"4thly. It remains only to consider *whether Lee, being in possession at the time of seizure, was entitled to hold possession, until payment of his expenditure on the estate, against a prior mortgagee.*

"Now the Court can find no authority for the position that a subsequent mortgagee in possession can hold the property mortgaged as against a prior mortgagee, without possession either for his debt or for his expenditure in the improvement of the pledge. Such a doctrine would render all mortgages without possession unsafe, and yet would not go far enough for the present case, for Lee was in possession, not as mortgagee, but as agent of the owner under the power of attorney annexed to his mortgage, and, after the sale of the estate, his right to hold possession ceased, and an illegal possession can confer no lien: the lien exists only over property pledged, and does not affect the rights of a prior mortgagee. It was thrown

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"Reference was also made by the counsel for Lee to a clause in the assignment from Martin and Marshall to Sinnaya Chetty of the 18th April last, by which it was provided that nothing in that deed should prejudice the right of Lee under the previous assignment to him of the £ 1536; and these words were relied on as an admission on the part of Sinnaya Chetty of the right of Lee under that assignment; but the words without prejudice cannot be construed as intended to give the previous assignment any effect which it would not otherwise have had by law, and the deeds in which the words occur is a deed poll from Martin and Marshall, not executed by Sinnaya Chetty.

"The Court in deciding against the claim of Lee, is conscious of the great hardship which he has suffered from the fraud which has been practised upon him by Edermanesingham; but in the absence of any suggestion either of participation in the fraud or of concealment on the part of the Chetty, the proceeds of the mortgaged property must be administered according to the priority in time of the claims against it, and the Court can in the present proceeding give no remedy for the injury inflicted, without prejudicing the rights of another innocent party.

"The application of the claimant is therefore dismissed, parties paying their costs respectively."

On appeal, the Supreme Court affirmed the judgment of the Court below, in these terms :—

The long and careful judgment of the District Court Judge in this case sets out the facts so fully, and states the law and the reasoning on the law as applied to the facts so ably, that the Supreme Court does not feel itself required to give a lengthened judgment on the appeal.

The only matter on which we at all differ from the District Court Judge is as to that part of the judgment in which he says that before the 2nd instalment from Edermanesingam to Martin and Marshall fell due, "Edermanesingam entered into an arrangement with W. D. Lee, by which the latter agreed to pay that instalment and to make advances to carry on the cultivation of the estate." This would give the idea that a principal and a primary part of the arrangement between Edermanesingam and Lee was an agreement that Lee should take on himself Edermanesingam's bur-

den of the mortgage to Martin and Marshall to a certain amount: whereas we think on careful consideration of the parol evidence and documents in the case, that the main substantial agreement between Lee and Edermanesingam was an agreement that Lee should make advances for the estate, in consideration for which he was to receive certain interest, and to have the powers of agent and factor for the estate and the right to have all the crops consigned to him at a fixed rate (the proceeds to be employed in a specific manner), and he was to have by way of security a mortgage on the estate, subject to the primary mortgage to Martin and Marshall, which alone was disclosed to him. There was to be an advance of £1500 on the first January then next, and further advances for cultivation not exceeding £125 per month. The application of this £1500 in payment of the instalment and interest due to Martin and Marshall was, we think, a minor matter of subsequent arrangement between Lee and Edermanesingam, though doubtless the amount had been calculated by Edermanesingam with regard to his requirements as to Martin and Marshall.

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The opinion which we hold as to the nature of the transaction between Edermanesingam and Mr. Lee makes of course an additional reason for confirming the judgment of the District Court.

We entirely reject the theory set up by Lee's counsel, the theory that there had been a mutual arrangement between Lee and Edermanesingam that he should be substituted for Martin and Marshall as mortgage creditor to the amount of the £1500. We do not say that Mr. Lee's present claim could have been upheld, even if such an arrangement had existed; but its non-existence is enough to invalidate the greater part of the arguments that were urged before us on Lee's behalf.

We consider that when Mr. Lee paid Martin and Marshall the £ 1536, he paid it as one of the advances he was to make to Edermanesingam, and not with any idea of becoming a substitute of Martin and Marshall to that amount, and so protecting himself against any intermediate mortgage. Indeed he was not only without notice of any such intermediate mortgage, but he evidently believed Edermanesingham's assurance that Martin and Marshall's mortgage was the only one in existence prior to his own.

We further quite agree with the District Court Judge that Lee, when he paid the £1536, was not already a creditor of Edermanesingam, and that when long afterwards he obtained an assignment of Martin and Marshall's supposed right to that amount, Martin and Marshall had ceased *quoad hoc* to be creditors. We quite agree with the District Judge's comments on the passages cited from Domat and De Sande, and we with him consider this not to have been a case where a prior creditor's encumbrance was paid off by a subsequent creditor.

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We equally agree with him as to his decision on the second part of this case. We think that Mr. Lee has no claim, certainly no claim in preference to the second mortgagee's, in regard of the sum paid by him for the cultivation and improvement of the estate. Mr. Lee did not take possession as mortgagee, but as the mortgagor's agent and factor. We do not think that the monies laid out by him in cultivation gave him the tacit hypothec contended for, and even if they did, that hypothec being subsequent in date would be inferior in obligation to the express special hyphothec of Sinnaya Chetty. We will not repeat the excellent commentaries of the District Court Judge on the authorities cited before him; but as several authorities were cited before us in behalf of Mr. Lee which do not appear to have been mentioned below, we will briefly advert to them, and state the effect which due consideration of them has produced on our minds.

On the first point, on the substitution of the third mortgage for the first, Story's *Equity Jurisprudence*, vol. 1. p. 635 was referred to. That does not carry the case further than the passages from Domat quoted below ; it deals only with the position of the later creditor who buys up the debt of an older creditor ; and its applicability here is refuted by the same reasoning which the District Court Judge has used as to the citation from Domat.

The passage in 3 *Burge* refers to the Code Napoleon only.

On the second point, on the claim to be paid before Sinnaya Chetty on the supposed tacit hypothec for the advancement of money for cultivation, we were referred to Herbert's *Grotius*, p. 262. That is merely an authority in favour of the hypothec of " whosoever has lent money for the building or repairing of a house or ship," and at p. 267 of the same book, it is laid down that " a tacit mortgage has in every respect the same effect as a special : so that between several tacit mortgages, or between one or more tacit, and one or more special conventional hypothec, regard is to be had as to the antiquity of the obligation."

Vanderkeessel, p 438 is precisely to the same effect.

The passage in 3 Burge is only as to repairing and rebuilding a house, it cannot go beyond things imperatively necessary for the preservation of the property in question.

We were referred in behalf of Mr. Lee to Voet *on the Institutes*, bk 20, tit. 2, sec. 28. This high authority is clearly against the present claimant. Voet limits the tacit hypothec to the case of preserving and repairing a house. He gives a special reason why such hypothec arises in such a case. The reason is " Publici aspertus favor propter quem domini etiam inviti magistratus auctoritate coguntur ædes reficere " And in the same part of his commentaries, he says "Longi minus pignus legale illis qui in aliarum rerum sive reparationem sive meliorationem sive emptionem crediderunt."

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iii. Burge 349,350 was next cited. This part of his work when examined is found to apply solely to cases connected with West Indian property. Burge speaks of the peculiar nature of that property, and says that there "exists no express law by which a person furnishing the supplies of an estate has any lien on the estate itself or its proceeds.

Sayers v. *Whitfield*, 1 Knapp 133, and the case in 14 Vesey 438, which were cited, are both cases as to West Indian property and on special circumstances which have no bearing here.

On the whole, we are of opinion, as to the first branch of his claim, that this was not a case of a later encumbrancer, buying up the mortgage of a prior, so as to entitle him to the rights of that prior one as against an intermediate encumbrancer.

With regard, to the second branch, as to the claim in respect of advances for cultivation, we do not think that any tacit hypothec was created ; and even if there were, such tacit hypothec can have no priority as to payment over the earlier special conventional hypothec of Sinnaya Chetty.

We fully agree with what the District Court Judge has said as to the good faith of both Mr. Lee and Sinnaya Chetty in these transactions, and in the regret expressed by him for the injury which Edermanesingham's fraud has caused to Mr. Lee. But we cannot relieve Mr. Lee at the expense of a third person, whose claim is as good as his morally, and superior to his own in point of law.

(1.) D. C. Kandy, No. 85.	In the matter of the Insolvency of Durand Kershaw : Suppramanian Chetty and Raman Chetty ... ... Appellants.
(2.) D. C. Kandy, No. 36105.	Mrs. Amelia Kershaw Plff. and Respdt. vs. Messrs. Andrew Nicoll and Henry Bird, assignees of the Insolvent estate of Durand Kershaw, ... Dfts. and Applts.
(3.) D. C. Kandy, No. 36592.	Andrew Nicoll and Henry Bird, assigness of the Insolvent estate of Durand Kershaw, ... Plffs. and Applts. vs. Edward Gledstone Le Pelly and others Dfts. and Respdts.

Europeans, resident in Kandy—actual and matrimonial

The following judgment of the Supreme Court sets out all the facts of the case:—

These were appeals arising out of the Insolvency of Mr. Durand Kershaw of Atgalle in the Kandyan territory in this Island.

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domicile—European woman—Kandyan wife—Kandyan Law.
Husband and wife—post-nuptial settlement—voluntary conveyance fraudulent preference—insolvency.

Mr. Kershaw was adjudicated an Insolvent on the 13th September last. His certificate was opposed by two of his creditors, named Suppramanian Chetty and Raman Chetty, the appellants in No. 85.

While the Insolvency proceedings were pending, Mrs. Kershaw, the insolvent's wife, brought an action, No. 36105, against the assignees to establish her right to certain property called Elk Cottage at Nuwera Eliya in the Kandyan territories; and the assignees brought an action No. 36592 against certain trustees of Mrs. Kershaw's, to recover possession of a moiety of an estate called Kaipogalle, situate also in the Kandyan provinces.

The questions raised in the Insolvency proceedings were to a great extent identical with those raised in the two last mentioned actions; and the three cases were so closely connected that, by a very proper arrangement and on consent of parties, the evidence taken in any one of the cases was considered to be evidence (so far as applicable) taken in each of the other two, and judgment on the three cases was given on the same day by the District Court Judge.

He decided the land actions against the assignees and in favour of Mrs. Kershaw's and her trustees; and he gave the insolvent a first class certificate. The assignees have appealed against the first named two of these decisions, and the opposing creditors have appealed against the last.

There are three substantial questions to be considered,—

1st. Are the conveyances by the Insolvent of the Kaipogalle estate to his wife's trustees valid against the assignees?

2ndly. Is the conveyance by the Insolvent of the Elk cottage property to his wife valid against the assignees?

3rdly. Having regard to the insolvent's conduct in the conveying away of these estates, and also to his conduct in some other respects (which will be hereafter detailed), is the insolvent entitled to any, and, if so, to what class certificate?

It was material in this case (especially with regard to the question about the Elk Cottage property), to ascertain whether the matrimonial domicile of Mr. and Mrs. Kershaw was or was not in the Kandyan territory.

The proceedings in the cases, as they came up to us from the District Court, gave no information on this point. They shewed that the *actual* domicile was Kandyan, but they gave no light as to what was the matrimonial domicile. Instead of putting the parties to the expense and delay which would have been caused by our remitting the cases to the District Court, we, under the power vested in us for taking fresh evidence when the interests of justice require it, examined Mr. Kershaw on this point; and his answers to a few questions distinctly proved that the matrimonial as well as the actual domicile of himself and Mrs. Kershaw was Kandyan.

The insolvent's books were not in the first instance sent up to us. We desired to see them, and as we had reason to believe that they had not been very minutely examined, one of us has carefully and with the labour of some days gone through the accounts, the letter books and the other documents contained in the books now on the table of the Court. This examination brought many important things to our notice, some of which seemed to require explanation; and as the attention of the insolvent had not been directed to them in the proceedings below, we thought it right and fair that he should have an opportunity of explaining them before us, if he desired it. His counsel accordingly called him, and he and another witness were examined before us.

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By consent and by arrangement similar to the course followed in the District Court, all the evidence taken before us is to be held as taken in each of the three cases so far as respectively applicable.

We shall adjudicate on these cases in an order like that adopted below. We will determine, first, the validity of the Kaipogalle conveyances (these being first in date); next, we will determine the validity of the Elk Cottage conveyance; and lastly, we will consider the question of the certificate.

But there are many things to be considered which are common to all three cases. And there are certain main facts, clear and indisputable facts, which may be conveniently stated and arranged in chronological order, before we come to the disputed points in these several suits.

Mr. Kershaw first came to Ceylon in 1844. He returned to Europe for a short time in 1855, having in the meanwhile become proprietor of several coffee estates in the Kandyan territory. He married Mrs. Kershaw at Guernsey in 1855, and at the time of the marriage both he and Mr. Kershaw contemplated coming to Ceylon and permanently residing on one of Mr. Kershaw's coffee estates in the Kandyan Provinces. They came here before the end of 1855. Mr. Kershaw was for a short time in Government employ here, but he left it in 1856, and thenceforward to the time of his insolvency he and Mrs. Kershaw resided at one of his coffee estates at Atgalle, near Gampola, in the Kandyan territory. Besides his business as a coffee planter, he carried on engineering business also within the Kandyan territory. Mr. Kershaw appears at the time of his return from England to have been possessed of considerable property: but his affairs grew worse, especially in and after 1857.

He had made no settlement on his wife before their marriage, but there was an antenuptial agreement signed and sealed at Guernsey (the precise effect of which will hereafter be explained) by which a certain sum was to be paid to Mrs. Kershaw, if she survived him.

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On returning to Ceylon in 1855, he placed the Guernsey antenuptial agreement in the hands of Mr. De Saram, the well known Proctor of this Island; but that gentleman has proved that he received no instructions to prepare any settlement under it, until the 20th March 1858. It is stated that there was (and it is self-evident that there must have been) some difficulty in preparing a settlement under it; but on the 25th May 1859, Mr. Kershaw by a deed, purporting to be in furtherance of the Guernsey agreement, conveyed to trustees in Mrs. Kershaw's behalf a moiety of the estate of Kaipogalle, which estate Mr. Kershaw had bought in the beginning of the preceding year. In August 1860, he conveyed, by a similar deed to the same trustees, some forest land adjoining the Kaipogalle estate and designed to form part of it.

In April 1860, Mr. Kershaw bought from Mr. Macartney a cottage called Elk Cottage at Nuwara Eliya. The purchase money was £110. Of this only £10 was paid at the time, and Mr. Macartney retained the title deeds till he got the balance. On the 26th May 1860, an aunt of Mrs. Kershaw's died at Guernsey, and by her will bequeathed a share of certain property to Mrs. Kershaw, described by her maiden name of Amelia Le Pelly in the will, which had been drawn before Mrs. Kershaw's marriage. The bequest to Amelia Le Pelly was not expressed to be to her sole use, although the will did direct that the share accruing to Jane de Pelly (another of the legatees) should be secured to Jane de Pelly's sole use.

On the 10th January 1861, Mr. Kershaw paid Mr. Macartney the £100 balance of the purchase money of the cottage.

Early in January 1861, Mrs. Kershaw's attornies in Guernsey (being attornies for her only, and not for Mr. Kershaw) received from the executors Mrs. Kershaw's legacy, amounting to £600. Of this £50 is disbursed in Guernsey in paying off some private accounts of Mrs. Kershaw's; the remaining £550 was on 10th January 1861 paid by Mrs. Kershaw's attornies to Mr. Kershaw's Agent in London, Messrs. Dobree, and is by them placed to his credit in his account with them.

On the 18th January 1861, Mr. Kershaw directed Mr. Ferdinands, a Proctor here, to prepare a conveyance of Elk Cottage from himself to Mrs. Kershaw; and he on the 4th February 1861, executed the conveyance to her of that property.

It is stated on Mr. Kershaw's behalf that he had improved the value of the cottage since his purchase of it from Mr. Macartney, and that altogether the sums, which he had laid out on the cottage before his insolvency, a little more than equalled the amount of the £550, the legacy to Mrs. Kershaw. On 12th September 1861, Mr. Kershaw filed his declaration of insolvency.

The amount of his liabilities is upwards of £28,000. The

assets hitherto realised are less than £10,000. This amount has been effected by sale of the coffee estates (exclusive of the subject matter of the present litigation,) and it is stated that little more is likely to be obtained from the other property, exclusive of that which is the subject of the present litigation. 1862. August 14. —

The assignees impeach the validity of the conveyances, both of Kaipogalle and of Elk Cottage; and with regard to the conveyance of Elk Cottage, a curious and important point arises, which we must deal with before we address ourselves to the scrutiny of the insolvent's pecuniary position at the time of the transfer.

We must see whether Mrs. Kershaw had the right of a Kandyan wife as to receiving and holding property independently of her husband, and of entering into contracts with him or with any one else in her own right, or whether she was under the Roman Dutch Law, according to which there is community of property between husband and wife, and according to which she could have no such rights as have been exercised or attempted to be exercised here.

It is to be borne in mind that the legacy to Mrs. Kershaw, with the proceeds of which Mr. Kershaw says that he bought and improved Elk Cottage, was not a bequest to her sole and separate use, and that therefore there would be no equitable jurisdiction to appoint trustees for her to receive it and hold it to her sole use. Neither is this a case where either the husband or the assignees are seeking the aid of the Court to compel payment of a fund accruing due to the wife. So that there is no equitable power here to compel a settlement of part, or of perhaps the whole of the money on the wife, such as arises when either the husband or his assignees claim a sum accruing *jure uxoris* but not reduced into possession.

This £550 came into the husband's possession when it was paid to his account at Dobree's.

Unless Mrs. Kershaw is to be regarded as a Kandyan wife, she had no separate right whatever to the monies when it had been so paid to the husband; and unless she is to be regarded as a Kandyan wife, the direct conveyances of the property from her husband to her is a mere nullity.

It was in the expectation of this point arising in the case that we considered it material to ascertain the matrimonial domicile of the parties. If it had been proved elsewhere than in Kandy, though the actual domicile at the time of these transactions was in Kandy, we must notwithstanding the Ordinance No. 21 of 1844, section 6, have addressed ourselves to consider, and to adjudicate on, the very difficult question, whether in such cases the law of the matrimonial, or the law of the actual, domicile must prevail as to the *status* of the parties, a question on which so many of the greatest jurists have differed, as may be seen by reference to the authorities cited in the well-known treatises of Story and Burge.

1862. August 14. — But it has been clearly proved in this case that both the actual and the matrimonial domiciles were in Kandy: and we must treat Mrs. Kershaw as having the rights of a Kandyan wife as to her property not being the property of her husband, and as to her capacity to contract in her own right, unless we were to hold that the Kandyan Law applies to native Kandyans only, and not to Europeans who have become resident in the Kandyan Provinces.

This is a question of very great moment in the administration of the law in an important province of this Island; and as we may, while this case was being discussed, have raised doubts on the subject, we think it right to state somewhat fully the reasons which have led us ultimately to the conclusion that the operation of the Kandyan Law is not limited to Kandyan natives, and that we are bound to apply it in the present case.

The general principle is well known that a conquered or ceded country is to be considered as retaining its former laws, until the sovereign orders a change. But there may be exceptions to this presumption, and it is easy to imagine, or to point out in history, instances of nations or tribes having organization enough to make them "states," within the meaning of International Law, and with which obligatory treatises as to cession and other matters might be made, but whose laws might be so savage, so iniquitous and immoral as to make it impossible to presume that a Christian European sovereign, who became sovereign of such a nation or tribe by conquest or cession, would intend the continuance of such laws, at least so far as regards the European sovereign's European subjects, who might become settlers in the new territory. Without imputing to the Kandyan Law generally a character as has been just stated by way of hypothesis, we must say that it contained much that unsuited it for European habits and feelings, and that the whole Kandyan Marriage Law, especially as it existed until a very few years ago, with its allowance of polygamy (and that in the form of polyandry, the form most offensive to European feelings,) its allowance of arbitrary and capricious divorce, and the easiness with which the rights of legitimacy are given to the issue of loose and casual connexions, was utterly repugnant to the most cherished feelings, and the most fixed principles of Christian Englishmen and women; and it is hard to suppose that they, when they came to live in Kandy, were intended to be under Kandyan law, in their capacities and obligations as husbands and wives. (It may be particularly mentioned, with special reference to the present case, that the reason given in the best work on Kandyan Law, Armour p. 9, for there being no community of goods between husband and wife, and for their respective estates remaining distinct from each other, is that, according to Kandyan law, the husband may at any time with or without just cause divorce his wife, and so may the wife divorce herself from the husband).

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All this however is speculative as to what the will of the sovereign should be supposed to be when no express directions have been given as to the continuance and effect of a conquered country's laws. Where there have been expressions of the sovereign's will, they must guide us.

It is commonly said that the maintenance of the Kandyan law was granted by the representatives of the English sovereign when the Province was ceded in 1815. That Proclamation dated 2nd March 1815 will be found at p. 180 of the first volume of the Legislative Acts of the Government of Ceylon. If it stood alone, we should consider it rather an authority to shew that the Kandyan laws were to apply to Kandyans only. The 4th clause granted those laws to the Kandyan chiefs and people. The 8th clause provides that (with and under certain conditions) "the "administration of civil and criminal justice and police over the "Kandyan subjects of the said Provinces is to be exercised according to established forms and by the ordinary authorities." The 9th clause provides separately for the administration of justice "over all other persons, civil or military, residing in or resorting to "these Provinces, not being Kandyans, until the pleasure of His "Majesty's Government in England may be otherwise declared."

But the terms of this Proclamation was not altogether approved of by the Home Government, and at p. 190 of the same volume of the Legislative Acts will be found a Proclamation issued here on the 31st May 1816, which recites a despatch announcing that H. R. H. the Prince Regent had declined to adopt the pre-existing laws and courts of Kandy as forms of the King's civil judicature, until more detailed information should have been obtained, as to the nature of the laws, and the changes which it may be expedient to introduce in their administration. It recites also an opinion of of the law officers of the crown (which opinion is preserved in the archives of the Colony,) and then it proclaims *inter alia* that "the "ancient laws of Kandy are to be administered till His Majesty's "pleasure shall be known as to their adoption *in toto* as to all "persons within those Provinces, or their partial adoption as to the "natives, and the substitution of new laws and tribunals for the "trial and punishment of His Majesty's European subjects for "offences committed therein."

It appears from these state documents that a temporary administration of the ancient laws of Kandy was designed, and no distinction of persons is directed during such temporary administration. The royal legislation as to Europeans resident in Kandy, which is contemplated in this Proclamation, was delayed, nor can we find that it ever took place, at least not until the Ordinance of 1852 hereafter to be mentioned. The Proclamation of 21st November 1818, which was issued on the suppression of the

1862. August, 14. — Kandyan Insurrection in that year, contained provisions as to administration of justice, which, from clause 34 to clause 50 inclusive, provide particular tribunals and processes "for hearing and "determining cases wherein Kandyans are concerned as defendants, "either civil or criminal." Clause 50 provided that "the people "of the low country and foreigners coming into the Kandyan "Provinces shall continue subject to the civil and criminal juris-"diction of the Agents of Government alone, with such additions "as His Excellency may by special additional instructions vest "in such Agents."

This proclamation made some difference as between Kandyans and non-Kandyans, so far as regarded the administrators of the law; but it did not direct any variation in the kind of law to be administered. And the Charter of 1833, while it abrogated the then existing tribunals and established District Courts for the whole Island including Kandy, gave no direction for any change in the application of Kandyan law. In point of fact, so far as we have been able to ascertain, the old Kandyan law was followed in all litigation in Kandy, whoever were the litigants, on all subjects as to which any Kandyan law existed; and on matters unknown to the Kandyan law, recourse was had, not to the Roman Dutch law, or to the English law, but to the principles of natural equity.

When we consider how few European residents there were in the Kandyan Provinces before the time of the coffee plantations, we shall not feel surprised that the legislation contemplated in the Proclamation of 1816, as to what law Europeans in Kandy were to live under, did not take place. No practical grievance was caused by the delay, and the subject was naturally forgotten.

But when the extensive coffee planting brought in a considerand rapidly increasing European population, the unfitness of Kandyan law for Europeans, especially as to the validity of marriages and rights of succession, was felt and observed, and in 1851 the Judges of the Supreme Court, sitting collectively, recommended, in answer to a communication from the Governor, that, among other amendments in the law, the old Kandyan laws should be retained in the Kandyan Provinces so far as regarded Kandyans themselves, but that the laws of the maritime Provinces should be observed in the Kandyan Provinces as to the persons and properties of all persons other than Kandyans. It is clear from this document (preserved in the books of our Registrar,) and the documents connected with it and connected with the Ordinance 5 of 1852 (which last mentioned documents are in the colonial archives, and which we have consulted,) that the Supreme Court at that time considered the Kandyan law to apply to *all* residents in the Kandyan Districts, and that the change recommended by the Supreme Court Judges, which have exempted all non-

Kandyans from the operation of Kandyan law, was thought by the authorities here too sweeping ; and that it was proposed to legislate specially for particular subjects. Accordingly the Ordinance 5th of 1852 was passed, and the second passage of its preamble recites the expediency "that the law of the Kandyan Provinces should "be assimilated as far as may be to the laws of the Maritime pro- "vinces." The 5th clause of this Ordinance is as follows: "Where there is no Kandyan law or custom, having the force of "law applicable to the decision of any matter or question arising "for adjudication within the Kandyan Provinces, for the decision "of which other provision is not herein specially made, the Court "shall in such case have recourse to the law as to the like matter "or question within the Maritime Provinces, which is hereby "declared to be the law for the determination of such matter or "question."

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The 6th clause extends the law of Namptissement to the Kandyan Provinces. The 7th clause extends the criminal law of the Maritime to the Kandyan Provinces. The 8th enacts that the inheritance and succession to the property of Europeans and Burghers in the Kandyan Provinces is to be the same as in the Maritime Provinces ; and the 9 clause ordains that marriages between Europeans and Burghers, or between an European or Burgher on one side and a Cinghalese on the other, within the Kandyan Provinces, shall not be valid, unless such marriage would have been valid if contracted in the Maritime Provinces. The 10th clause extends to Mahometans in the Kandyan Provinces the right of being judged, in matters between themselves, by the Mahometan code.

If we take this Ordinance and consider its meaning by an examination of its contents only, without any light from exterior sources, it is impossible not to regard it as a Legislative declaration that, before it was passed, the Kandyan Law extended to all persons in the Kandyan territory, and as a declaration that the Kandyan law was to continue so to extend, except in the particular cases wherein the Ordinance itself introduced new law into Kandyan territory, or exempted particular classes of Kandyan residents from the operation of the old Kandyan Law.

If we read the Ordinance with the aid of historical information and of comparison with other legislative instruments *in pari materie,* the conviction becomes still stronger that Kandyan Law is not limited to Kandyan natives, but extends to cases like the present, always supposing that its operation has not been expressly limited by any enactment on the subject.

We, therefore, in determining the status of the parties here, as to community of goods and as to the wife's ability or disability to acquire, to hold and to deal with property independently

1862. August 14. of her husband, are bound to apply the Kandyan Law, as being the law of their actual and matrimonial domicile, and we adjudge accordingly that Mrs. Kershaw had a separate estate in property coming to her ; and that she could legally receive and hold property directly from her husband or any one else, whether by way of gift or under contract.

All this is ofcourse subject to the provisions of the Insolvency Ordinance which, as has been rightly said in the argument, applies to the whole Island, and the operation of which in the present case we now proceed to consider.

All that we hitherto have determined is that Mrs. Kershaw is not to be regarded as under a legal disability to receive and hold property, or to deal in her own right, such as she would have been under, if her matrimonial status were to be regarded according to either Roman Dutch or English Law.

A conveyance to her in fraud of Mr. Kershaw's creditors is not protected because she is his wife. The counsel for the assignees has put this very fairly in the argument on the Elk Cottage case (the one in which her marital position is material). He says "let Mrs. Kershaw be regarded as a Kandyan wife. She was then "one of Mr. Kershaw's creditors, and in conveying Elk Cottage "to her, he gave her a fraudulent preference over his other credi- "tors." The issue could not have been more fairly or more tersely stated.

The material clauses of the Insolvency Ordinance which we have to consider are the 7th, the 56th and the 50th (as will presently appear ; the opinion which we hold on the facts of the case makes it unnecessary to consider the 51st).

The general effect of these clauses, as bearing on the present case, may be stated to be, that if a person fraudulently transfers any part of his property with intent to defeat or delay his creditors, such transfer is bad, and is an act of Insolvency ; that any transaction which by the contemporaneous Bankruptcy Law of England would be a fraudulent preference of one creditor to others, is to be considered a fraudulent preference under our Insolvency Ordinance, and as such is bad, and is an act of insolvency.

Before however we apply this law to the cases before us in their details, we had better deal with one defence of the Kaipogalle property, which is set up in the pleadings of the trustees, and appears on the face of the deeds of transfer themselves.

It is said that these conveyances of the Kaipogalle property to the trustees for Mrs. Kershaw were executed in pursuance of the ante-nuptial contract for a settlement, which was signed and sealed between the parties at Guernsey.

Let us see what the terms of this agreement are. The subtantial part is as follows : "It is covenanted and agreed between

"the said parties to these presents, that in case the said Amelia De "Pelly shall survive the said Durand Kershaw, she, the said "Amelia De Pelly, shall receive during her natural life from the "real and personal estate of the said Durand Kershaw, and in lieu "of all thirds, dower or other claim to which she would by law be "otherwise entitled, an annuity of £300 sterling, the said annuity "to commence from the day of the decease of the said Durand "Kershaw, and to be paid quarterly (the first payment to be made "three months after the decease of the said Durand Kershaw) to "the said Amelia De Plley, free of all deductions charges or ex- "penses whatever, *out of the proceeds of the estate of what nature "and kind soever which the said Durand Kershaw may leave at "decease.*"

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Now compare with antenuptial agreement the conveyances that are said to have been made in pursuance of it. They give a certain and immediate benefit to the wife ; the agreement contemplates only a benefit conditional on her surviving her husband, and not to commence till after his death.

The agreement does not charge the estate, which Mr. Kershaw then had, or which he might acquire during the marriage, with the contingent liability to pay this annuity to Mrs. Kershaw if she survives, but especially provides that it shall be paid out of such funds as he may leave at his decease.

The conveyances divest him of part of his estate while he is alive : the agreement contemplates that he should have full power to deal with it until his death. The obvious intention of such agreements, when the husband is engaged in active business which requires the free use of capital, is that he should have the unfettered use of all his funds in carrying on his speculations ; and the lady and the lady's friends must be considered as having relied on his skill and his good fortune for his success, and on his leaving property behind him, out of which his widow could claim her annuity. It would give the widow a charge on all the husband's assets at his death in preference to any heir or legatee. It would enable the wife to prevent the husband from executing any fraudulent disposition of his property calculated and intended to deprive her of her rights over it at his death. There are several cases cited and commented on in Atkinson's Conveyancing, p. 323, in which the parent of one of the parties entered into an agreement of this kind. The principle is the same, as to the power of the father in-law of the husband to deal with his property as he pleases in his lifetime, as to "*altering the nature of it, as to giving scope to projects,*" and the like, although the wife or the daughter-in-law has an interest assured to her in what he leaves behind him.

We cannot hold that the Guernsey antenuptial agreement placed Mr. Kershaw under any obligation to convey any of his

1862. August. 14. property in the manner in which the transfers of the Kaipogalle Estate were attempted. It is a well known point in Bankruptcy Law that the moral obligation of supporting a wife and children cannot, as against creditors, be considered a valid consideration for a post-nuptial settlement, when not required by antenuptial agreement.

We must pronounce these conveyances of the Kaipogalle property to have been voluntary and without consideration.

It does not necessarily follow that they were void. In order to ascertain their validity or invalidity, we must examine the insolvent's conduct and financial position at the time when they were made.

In saying that these conveyances are not necessarily void, because voluntary, we are following a very valuable judgment of Vice-Chancellor Kindersley in the case of *Thompson* v. *Webster*, reported in the 28th vol. new series, of the Law Journal, Chancery p. 702. It is a judgment on the validity of a marriage settlement under the well-known English statute 13 Elizabeth, which statute is so ably commented on in Smith's Leading Cases vol. i, especially in the edition of that work by Mr. Justice Willes and Mr. Justice Keating.

The material words of that statute, which render void all conveyances &c., contrived "to delay, hinder, or defraud creditors" are nearly followed at the end of the 7th clause of our Insolvency Ordinance, and the English decisions on the statute are made binding authorities on us in this matter by the 58th clause of our Ordinance. Vice-Chancellor Kindersley points out that the mere voluntariness of a settlement does not *per se* invalidate it, nor does the fact of the grantor being insolvent *per se* do so. But still they are most important facts to ascertain. The question is, whether, looking to all the circumstances of a case, we must conclude that the conveyance was made with an intent to "defeat and delay creditors." A man must be taken to intend the natural consequences of his acts. And if we find a man, in insolvent and embarassed circumstances, conveying or attempting to convey away his property out of his creditors' reach, without there being any legal obligation on him to make such a conveyance, the conclusion is almost inevitable that he does so with intent to defeat his creditors of the means or part of the means for the payment of his debts to them ; and that consequently the conveyance is an act of insolvency under the Ordinance, and one which his creditors have a right to impeach as void against them.

Now then we must ascertain what were Mr. Kershaw's circumstances near to and at the time of the conveyances. As has been mentioned, Mr. Kershaw, when he settled as a coffee planter at Atgalle in 1856, appears to have possessed considerable property.

His London agents then were Messrs. Price and Boustead, and the correspondence between them and him which we have examined very carefully gives very full information as to the subsequent decline of his fortunes. 1862. August 14. —

It is clear (and it is a fact very much in Mr. Kershaw's favour on the question of certificate) that his circumstances became much worse in 1857, not through any extravagance or neglect on his part, but through the serious effect on the European coffee market of the commercial crisis in that year. This is clearly shewn by a letter of Mr. Boustead's, dated 20th October 1857, which we discovered among the books and papers. At the beginning of 1858, Mr. Kershaw was in a far worse position than he had been at the beginning of the preceding year; and the letters of his London agents to him on the subject become very important, especially when we mark the date of the first step taken by Mr. Kershaw towards conveying any of his property in settlement for his wife. In a letter dated 22nd January 1858, Mr. Boustead points out to Mr. Kershaw that the balance against him in their books is £ 9500, having increased by more than £5000, during the last twelve months. Mr. Boustead complains of this excess, and urges that it may be speedily diminished. In another letter, dated 5th February 1858, Mr. Boustead complains still more strongly of the large amount in which Mr. Kershaw had become indebted to them, and of the increase of the balance against him by more than £5000 during the year 1857. In this letter Mr. Kershaw is warned that this balance must be reduced, and his attention is called to the fact of the O. B. C. having announced a change in their rules as to discounting Ceylon bills, which Mr. Boustead says is "equivalent to a larger withdrawal of capital from houses engaged in business with India and Ceylon," and the last words of this letter repeat the warning that the London house cannot continue advances to him to the present extent.

Now these two letters must have reached Mr. Kershaw about the end of February or early in March, certainly by the middle of March 1858. And it is very remarkable that on the 20th of March 1858, Mr. Kershaw gave the first instruction to Mr. de Saram to prepare a conveyance of half the Kaipagalle Estate to trustees for Mrs. Kershaw. Mr. De Saram's evidence establishes this. The Guernsey antenuptial agreement had been left in Mr. De Saram's hands in 1855; but he had no instructions to prepare any settlement until 20th March 1858. It is impossible not to connect the date of these instructions with the dates of the receipt of the warning and almost menacing letters from the London agents. The inference is strong that Mr. Kershaw, on receipt of these letters, thought that he was in peril, and that he had better take steps to secure some of his property from the reach of his creditors: a

1862. August, 14. proceeding which it is the great object of the Bankruptcy laws to prevent.

But this date of 20th March 1858, when the instructions for the conveyance were given, though an important date, is not the most important one. The first conveyance was executed on the 25th May 1859 ; and we must see whether Mr. Kershaw's financial position had improved or grown worse in the interval. The evidence is irresistible, that throughout this time, the state of his affairs had been growing worse and had become more and more alarming. A letter of Mr. Boustead's, dated 16th February, repeats the warning given in the former letters and apprises Mr. Kershaw that a draft of his for £500 had been accepted "for the honor of the indorser." A letter of the 24th of March shews the absolute dishonor of another draft. One of the 9th of April contains these expressions : "Two such years as the last and the beginning "of this would lead to an absorption of £20,000 ; and without "any apparent equivalent in the shape of consignments." The same letter raises the rate of interest which he was to pay on the balance against him.

Letters of similar tone follow and shew that Messrs. Price and Boustead began to press for security, and the subject of mortgages is discussed. In a letter dated 19th March 1859, they tell him that "it is quite impossible to assist him further ;" and they state their intention to place the correspondence in the hands of one of their Agents in Ceylon, with a view to the recovery of their claim against him, or of putting it on a more satisfactory footing. A letter dated the 26th of the same month informs him that they have placed the matter in the hands of Mr. Lee.

Mr. Lee has been examined as a witness in these cases, and we have also letters of his, and letters of the insolvent to him.

It appears that Mr. Lee, by letters written from Colombo on the 3rd and 8th May 1859 respectively, advised Mr. Kershaw of his (Mr. Lee's) being instructed by Price and Boustead, to require from Mr. Kershaw a prompt payment of a large portion of the balance, £8418, due to them, and an immediate arrangement for the gradual reduction of the residue.

It is very important to mark these dates of pressure for payment on Mr. Kershaw early in May 1859, because it was on the 25th of that month that Mr. Kershaw executed the first Kaipogalle conveyance. It is also a very important fact that in this month of May, Mr. Kershaw gave Messrs. Alston Scott & Co., a mortgage for £4000 on his estates, not however including that half of Kaipogalla which was conveyed in settlement.

We have not the precise date of the day of the execution of this mortgage to Alston Scott & Co., but it is clear from the letters alluding to it (and it was admitted in the discussion before us),

that the mortgage to them was given sometime in that month of May ; and even if not actually executed before the 25th (the date of the Kaipogalle conveyance), it must have been in contemplation and in course of negociation. 1862. August. 14

It has been urged on behalf of Mr. Kershaw that his estates were unencumbered at the end of 1858, except a mortgage in Dickoya for £1000. But a man may be indebted to a far greater amount than the value of his estates, without having yet encumbered them ; and it is moreover clear that Mr. Kershaw when he signed the Kaipogalle conveyance had already encumbered or knew that he was about to encumber the estates on a very considerable amount.

Mr. Kershaw has given evidence to prove his solvency at the time. He says that he was worth £3000 at the end of 1858, and was worth £2000 at the end of 1859, but he admits that his liabilities at the end of 1858, were £17,429 ; and that at the end of 1859, they were £19,800. The existence of any surplus assets over these large amounts depends (as Mr. Kershaw admits) entirely on the accuracy of the valuation which Mr Kershaw has made of his coffee estates He estimated them as worth £22,000 ; but Mr. Nicoll and Mr. Lee, two gentlemen well acquainted with such matters, have given evidence that they were worth only £11,808. The estates actually realized at the sale £9600 ; but it is in evidence that an advance of £700 was offered immediately afterwards. And Colonel Bird has given evidence of their value in 1855 which (as far it goes) would ascribe to them a higher value than that given by Mr. Nicoll and Mr. Lee. But on the whole, we feel satisfied that Mr. Kershaw's estimate is very greatly in excess of the real value ; and that at the time of the conveyance of the 25th May 1859, he was in a state of insolvency, and was becoming continually more and more embarassed.

We form this opinion not only from the facts and figures which we have cited, but also from the general effect of a perusal of a large mass of other letters, accounts and documents respecting his financial position.

We ought not perhaps to omit to mention that it was said on the part of Mr. Kershaw that he could not have been insolvent at the time of the conveyances, because his two chief creditors, the firm of Price and Boustead and the firm of Dobree, were willing to carry on his estates for him. But that is quite disposed of by the evidence of Mr. Lee, who was agent for Price and Boustead. He says, " we were willing in conjunction with Dobree & Co., to carry on the estates for another year, but it was to be for ours and their benefit, and not *for that of the unsecured creditors.* We do not feel it necessary to enter into any detail of Mr. Kershaw's circumstances down to, and at the date of, the conveyance of the second part of

1862. August 14. — the Kaipogalle Estate in 1860, because it is indisputable, and it is undisputed, that Mr. Kershaw's affairs had been growing worse and worse.

We hold with respect to both these conveyances that they were voluntary conveyances, not having been executed in consequence of any obligation. We hold that they were executed by Mr. Kershaw while in a state of insolvency, and with the intent to withdrew those portions of his property from his creditors. We consequently hold that those conveyances are invalid and that the assignees have a right to recover those portions of the estate for the benefit of the creditors.

We now come to the transaction respecting Elk Cottage, which we think is of a different character. The case for Mrs. Kershaw is that a legacy had been left to her, and that part of the money so bequeathed was laid out in the purchase of Elk Cottage from her husband, who had previously bought it for himself. We have already taken much space and pains to demonstrate Mrs. Kershaw, being a Kandyan wife, had all the rights that a *feme sole* would have under Roman Dutch or English Law, and if the transaction was substantially such as it is described on her behalf to have been, it is perfectly legal and valid. Now, there is no doubt whatever about the money having been left to Mrs. Kershaw or about her attorney having received it. There is equal certainty that £550 of it was paid to Mr. Kershaw's Agents, and that their balance against Mr. Kershaw was reduced by that amount. Consequently, the estate has had the benefit of Mrs. Kershaw's money; and if property not exceeding the amount of that money has been transferred to her, the transfer has not been gratuitous.

This however is far from being enough to settle the question. The counsel for the assignees put the case thus : " we will admit for the sake of argument Mrs. Kershaw to have been a Kandyan wife, with full right to separate estate. When her money was paid to her husband's agents on his behalf, she became one of his creditors. But he being in embarassed circumstances and in contemplation of formal insolvency had no right to prefer her to his other creditors. The conveyance of Elk cottage to her was a fraudulent preference, and as such is void."

If this position could be maintained, the assignees would have a clear right to the property, but on careful examination of the facts, we do not think that this position is tenable.

Here, as in the other part of the case, strict attention to dates is all-important.

In April 1860, Mr. Kershaw bought Elk cottage of Mr. Macartney. The price was £110, of which £10 was paid at the time. On the 26th of May, the relative of Mr. Kershaw who left her the money died at Guernsey. News of her death and of her

having left a share of some of her property to Mr. Kershaw, would have been received before the end of the following month. The exact amount of the legacy was not then known, but it appears from the correspondence between Mr. Kershaw and Messrs. Dobree (who had become Mr. Kershaw's agent), and from that between Mr. Kershaw and Mr. Carey (who acted as attorney for Mrs. Kershaw in Guernsey), that Mrs. Kershaw's share was expected to be about £700, and it was thought this money would be paid by the executor to her attorney for her before the end of 1860. 1862. August, 14.

On the 10th January 1861, Mr. Kershaw pays Mr. Macartney the £100 balance of the purchase money of Elk cottage, and receives the title deeds which the vendor had until then retained as security although the conveyance to Mr. Kershaw had been executed soon after the bargain. It is to be observed that it is proved by a letter filed in this case that Mr. Macartney was informed by Mr. Kershaw that the purchase was being made with Mrs. Kershaw's money.

On the 18th January 1861, Mr Kershaw instructs the proctor to prepare a conveyance of Elk Cottage from himself to Mrs. Kershaw. On the 4th February following, the conveyance is executed. There was some discrepancy of evidence between Mr. Kershaw and Mr. Ferdinands the proctor, as to when the directions for this conveyance were given, but we think from the notes on the subject filed after the parol examination, it is clear that definite instructions to prepare the conveyânce were not given before the 18th January, but thatthe subject had been mentioned by Mr. Kershaw as early as the previous September. We found among the books and papers a series of letters beginning as early as 2nd February 1861 from Kershaw to Mr. Duff of the Oriental Bank Corporation here negotaiting an advance of money on mortgage of Elk Cottage. These appeared at first very unfavourable to Mr. Kershaw, as it seemed that he tried to raise the money on the property as if his own, after he had conveyed it away.

But Mr. Kershaw's and Duff's examinations have completely dispelled this prejudice. The mortgage was to have been by way of bond from Mrs. Kershaw, and Mr. Duff states that he was all through the transactions throughly aware that the cottage have been bought for Mrs. Kershaw with Mrs. Kershaw's money, and was Mrs. Kershaw's property.

Now the £550, balance of the legacy, after certain payments on Mrs. Kershaw's account in Guernsey, was not paid in at Dobree's until the 10th January 1861, and the first letter advising Mr. Kershaw of such payment is dated in London as of January 19th, and could not have been received by Mr. Kershaw before the date of the conveyance of Elk Cottage to Mr. Kershaw.

We cannot therefore see how Mr. Kershaw is to be looked on

1862. August, 14. — as having conveyed property to a person whom he knew to have previously become a creditor of his and whom he was preferring to his other creditors.

We think that the case set up on the other side is substantially true. Undoubtedly no specific remittances of money from London to Ceylon took place; and the whole business was conducted in a manner that has not unnaturally created suspicion. But we must remember that Mr. and Mrs. Kershaw, though having separate estates, were husband and wife, between whom the same strictness and formality in business transactions that would be looked for is not to be expected.

We think that when it was known that a legacy somewhere approaching £600 was coming to Mrs. Kershaw, it was arranged and understood that the money or a large part of it should be invested for her in property in Ceylon by Mr. Kershaw; that he should make the disbursements here for her, and that he should be paid by Mr. Kershaw's agent placing the money to his account at Dobree's.

There is one circumstance connected with this part of the case which it is better to deal with here, both because it tends to shew that the transaction was bona fide, and because if we deferred it, we should have to repeat much when we come to settle the question of certificate. Mr. Kershaw on examination before us stated, that as soon as he was advised of the payment of the legacy money into Dobree's, he credited Mrs. Kershaw with it in the account between her and himself which he kept.

He referred to his ledger as shewing this. The ledger (p. 208) has an entry such as Mr. Kershaw mentions dated as of 10th January. It was pointed out that this entry follows in the page entries dated of March and May in that year, and could not have been a contemporaneous entry.

Mr. Kershaw explained this by saying that he wrote the entry when he received a formal account from Dobree's crediting him with the £550, as paid in by Mrs. Kershaw's attorney to his account but that he re-entered it as of the date when the payment was made in London. We have found among the papers in the case an account of Dobree's made up to 17th April 1861, in which the payment of the £550 on the 10th of January is properly credited.

This appears to have been the first regular and correct amount received from them since the payment. Their preceding letter which mentioned the payment gave an evidently wrong amount and contained evidently blunders as to the amount of other sums, which Mr. Kershaw observed and complained of. This amount of the 17th of April would reach him in the course of May, and we find that the entry as to the £550 in the ledger stands between some May entries (no days of the month are given) and an entry of

£88. 3s. 6d. in Mr. Kershaw's favor for profit on the sale of an estate, which we know from other sources to have been accounted in June. We think the entry as to the £550 an honest entry. When it was made, the conveyance of Elk Cottage had already been executed. In the course of the examination about the ledger, some rough books were mentioned, which Mr. Kershaw said it was his habit to keep, but which he used to destroy when he made up his ledger.

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It does not seem that any of these rough books would have thrown light on the matter in question ; but Mr. Kershaw incidentally mentioned that after his insolvency he had destroyed some of them. This sounded like a serious matter, and we felt it our duty to enquire into it. It turned out that Mr. Kershaw's books, when he became insolvent, were not regularly made up to date. The assignees left these books with him requesting him to make them up. This he did and according to custom destroyed the rough books after he had posted their contents in the ledgers. The whole proceeding was very irregular. Assignees ought to be most strict as to the custody of books and papers, and the Insolvent ought not to be allowed to add anything, to alter anything, or to destroy anything, though he must have proper access to the books for the purpose of preparing his balance sheet. But the irregularity of the Insolvent seems to have been caused by the irregularity of his assignees, and we do not think him amenable to the heavy penalties which the law justly imposes on the wilful garbling or alteration or destruction of books by Insolvents.

It was said that Mrs. Kershaw's money could not have been used for the purchase of Elk cottage, because it had been employed in the purchase of the Harrison estate, which was afterwards sold at a profit. We think it enough to say that we agree with the District Court Judge in thinking that a comparative examination of dates and sums does not support this objection.

Mrs. Kershaw's action is for Elk cottage only, not for its furniture. The purchase money of the cottage was £110, but Mr. Kershaw had been repairing and improving the building for a long time before and after the transfer to Mrs. Kershaw, he had also placed various articles of furniture in it. His statement is that all this was done for Mrs. Kershaw with Mrs. Kershaw's money. Taking the view we have done of the main transaction, we think that this statement is to be regarded as substantially correct. The total amount of the money laid out in and for this cottage exceeds by very little the £550 received for the very legacy and this surplus is more than accounted for by other credits in Mrs. Kershaw's favour.

The present action is brought by Mr. Kershaw in respect of the Cottage only ; but we think that the assignees will do well not to raise any dispute about the furniture.

1862. August, 14. — We think it right to state that the opinion which we have expressed as to Mrs. Kershaw's rights in respect of Elk Cottage has been the gradual result of repeated examination not only of the parol evidence, but of numerous letters, accounts and other documents, which it is impossible to refer to in detail. Our opinion was at first unfavourable as to Mr. Kershaw's conduct in this transaction, but the more closely we have examined the better complexion it has assumed.

It remains for us to consider the objection to the certificate. The assignees do not oppose. The opposition comes from two creditors, whose claims against the insolvent, chiefly for rice supplied, are very heavy. Their grounds of opposition as used before the District Court Judge were (1) concealment of property. There is nothing to support this objection except an answer of the Insolvent's in one of the cases, that he believed he had a reversionary interest in some property in England, but that he did not know what his interest was, or its amount, and that there was a lawsuit about it. We quite agree with the District Court Judge in considering that the non-insertion in the schedule of such a visionary chance of uncertain benefit as this is not a concealment of property by the Insolvent as the Ordinance designed to be punished by denial of certificate. We will add that a creditor, who means to oppose on such a ground as this, ought to examine much more searchingly about it. It is not fair to ask one or two vague questions, and then to seemingly let the matter drop as if immaterial, but to reserve it to be urged against grant of certificate.

The second objection is a charge that the Insolvent obtained supplies from the opposing creditors, on the faith of his being owner of property which he had parted with.

This, if true, would be a very serious matter, but there is no proof of it, though, if true, the opposing creditors might themselves have easily proved it. They gave no evidence at all.

The next is that the Insolvent treated Price and Boustead unfairly. But Price and Boustead do not oppose him, and in the absence of any opposition by them or of any opportunity of examining them, we cannot withhold the certificate for supposed wrongs towards them.

The fourth ground of opposition was on account of the fraudulent disposal of Elk Cottage and the Kaipogalle property. We have held that the conveyances of the Kaipogalle property were void and fraudulent in the sense in which the word is used in Bankruptcy Law ; but it by no means follows that Mr. Kershaw's conduct in that transaction shews that decree of *moral* fraud which would justify us in applying against him the penal clauses of the insolvency ordinance.

The existence of the antenuptial Guernsey agreement, though

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we hold that it does not legally sustain the post-nuptial conveyances, is a circumstance entitled to much weight, when we look at the general character of the affair, to see whether his conduct in it is such as to make him unworthy of a certificate. And in reading this point we must also have regard to his general behaviour as a trader. No extravagance, no negligence is imputed to him.

It is clear that his misfortunes originated in causes beyond his control in the commercial panic in Europe in 1857, and that they were grievously increased by matters beyond his control by a succession of bad seasons for the coffee crops.

Having regard to all the circumstances, and specially bearing in mind that his assignees do not oppose him, we see no reason for altering the adjudication of the District Court Judge as to certificate.

The judgment in case No. 85 will be that the order of the District Court Judge is affirmed.

The judgment in case No. 36105 will be that the judgment of the District Court, declaring Mrs. Kershaw the proprietor of the messuage and premises in the libel mentioned and quieted in possession thereof, be affirmed.

The judgment in No. 36592 will be that the judgment of the District Court for the defendant be set aside, and judgment entered for the plaintiffs as prayed. Costs of the assignees to be paid out of the estate.

26th August.

Present:—Creasy C. J.

P. C. Galle, No. 43262.

Halliley v. *Juan* et al.

Customs Ord. No. 18 of 1852 cl. 88—[1 7of 1869, cl. 108]—excess of jurisdiction—reduction oi penalty—[cl. 115 of Ord. No. 17 of 1869]—"shall"—plaint by whom to be laid.

The conviction of the defendants in this case, instituted by the Collector of Customs, was quashed in these terms by the Supreme Court:—

This is a proceeding before the Police Magistrate against the defendants for breach of § 88 of Ordinance No. 18 of 1852.

That section specifies a number of acts and concludes as follows,—

"Then and in every such case, the party so offending shall be guilty of an offence, and shall for every such offence forfeit any sum not exceeding £100, nor less than £10."

There was abundant evidence of facts in this case, and the magistrate convicted the defendants and fined them £10 each.

It is objected to this conviction that the Police Magistrate exceeded his jurisdiction in fining to that amount. The Queen's Advo-

1862. August, 14 — cate replies that the objection can be cured by diminishing the amounts of the penalties to £5, as the certificate, required by the 13th section of the Police Ordinance No. 13 of 1861, had been presented, and the Supreme Court has power under the 25th section of that ordinance to make such amendment.

I agree with the Queen's Advocate and would accordingly uphold the conviction with a reduction of the penalty, were it not for another objection which has been taken to the legality of the conviction. "All penalties and forfeitures which shall be incurred under this ordinance shall and may be sued for and recovered in the name of the Queen's Advocate in the respective Courts of this Island, in like manner as other cases therein" § 96. [See § 115 of Ordinance No. 17 of 1869.]

In this case before me, the proceedings were not instituted by or in the name of the Queen's Advocate and the fact of the prosecutor being the comptroller of customs can legally make no difference.

I think this objection fatal. The proceeding is clearly one "to recover a penalty," and I am bound to give effect to the imperative word "shall" in the 96th section, unless there is anything in the text of the ordinance to shew that the words ought to be read as permissive or directory only. I do not find in the ordinance anything of the kind; and there seems to be a substantial reason for limiting the right of prosecution for penalties under the ordinance to the Queen's Advocate or those who act under him. The ordinance has many very strong (and very proper) provisions in favour of the prosecutor as to burden of proof and other matters. Such unusual privileges may be safely allowed where the prosecutor is an officer whose legal station is a guarantee for the propriety of his acts. But prosecution for these penalties might be made the engines of great oppression and extortion, if any and every person were allowed to institute them.

Conviction quashed.

29th September.

Present:—CREASY, C. J., STERLING J., and TEMPLE, J.

P. C. Colombo, No. 64740. } *Senanayeke v. Ravenchy.*

The following is the judgment of the Supreme Court:—

Disturbing public worship-Ord. No. 12 of 1846, cl. 24 [16 of 1865

In this case defendant and appellant was convicted for disturbing the performance of public worship in a chapel at Kelliponne, and molesting the congregation.

The charge was at first laid under the 26th clause of ordi-

nance 17 of 1844, and by an amendment, it was also laid under § 24 of ordinance 12 of 1846.

1862. Sept. 29. — cl. 80] —nature of service— "any place of christian worship."

As no proof was given that the chapel in question was one of the particular description of churches contemplated by the last mentioned ordinance, the conviction could not in the present state of the proceedings be maintained as under that last ordinance. The Supreme Court confines its attention to the ordinance No. 17 of 1844, the § 36 of which is as follows,—

"And it is further enacted that every person who shall under any pretence whatever, either within, or from without, any place of Christian worship, disturb the performance of public worship therein, or in any way during such performance molest any of the congregation, shall be guilty of an offence, and be liable on conviction thereof, to any penalty not exceeding £5, or imprisonment with or without hard labour for any period not exceeding three months."

It was first objected that at the time of the defendant's misconduct in the chapel, the minister was lecturing to his congregation, and that the delivering of a lecture did not amount to the performance of public worship; but it was in evidence that the minister, was expounding a chapter in the Bible, and whether such a discourse is called a lecture or a sermon can make no difference; it was also in evidence that the congregation was assembled to join in prayer as well as to receive instruction from their minister; and the Supreme Court think it clear that when a Christian congregation is assembled in their regular place of worship to join in public prayer, and to listen to the religious exhortation of their minister they are assembled for the performance of public worship within the meaning of the ordinance, and that any person who molests them during such performance is liable to punishment.

The objection however based on the nature of the service was not the main objection in the case. It was urged that this ordinance 17 of 1844 (commonly known as the Police ordinance) applies only to places where a police force has been established under the provisions of the second section. Unquestionably the preamble has regard only to police in town, and all the clauses of the ordinance, except that which we are now considering, and except the 32nd which directs the side of the road to be observed in driving, are expressly confined to "such towns and limits" as a police force is established in. But the words of the clause before us are general. It makes it punishable to create a disturbance "in any place of Christian worship," not "in any place of Christian worship within such towns or limits." The words of the Ordinance are ample enough to reach the mischief in the present case, and the Supreme Court do not think that it ought to control them by reference to the clauses which are worded differently, or because they go beyond the preamble of the Ordinance.

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With regard to the last point, the Supreme Court gladly adopt the language of Lord Denman in *Fellows* v. *Clay*, 4 Queen's Bench Reports :—

"Supposing the enacting words clear, there is no line of reasoning so dangerous as that which would deprive the statute law of its fair meaning, or in other words repeal an act of Parliament by a judicial construction founded on the mere fact that the remedy provided is more extensive than the evil to be cured. It is enough to say in general terms, on this doctrine, that the mischief is but the motive for legislation, and the remedy may both consistently and wisely be extended, beyond the mere cure of that evil, to every provision which the most comprehensive view of the law, the state of manners and of society at large, may appear expedient."

The conviction is affirmed.

P. C. Jaffna, No. 1882. } *Worthington* v. *Raphiel.*

The following judgments were delivered in this case:—

Master and servant—Ord. No. 5 of 1841, cl. 7—disobedience of orders. Practice—irregularities—plaint by whom to be laid—power of Court to re-open order of dismissal—amendment of plaint.

TEMPLE, J.,—This is a conviction under the 7th clause of Ordinance 5 of 1841 for disobedience of orders in defendant absenting himself from his mistress's house without reasonable cause, on the night of 11th August 1862.

There are some irregularities in the proceedings, as the making Valoo Armogam the complainant on behalf of Miss Worthington, and the not dismissing the case on the 15th and re-opening it on the 18th. The former irregularity I consider was amended on the 18th by Miss Worthington being made the prosecutrix under the 24th clause of the Rules. And as to the re-opening of the case, the 13th clause of the Rules allows the Magistrate to adjourn the hearing on the complainant's absence, instead of dismissing the case, and although the Police Magistrate may not have strictly followep that rule, be seems to have acted under it. The substantial rights of the defendant have in no way been prejudiced, and he has waived any objection he might have made by subsequently pleading to the charge without objection.

As to the merits,. the defendant admits his absence, and it is clear from the evidence that when he went home he did not intend to return that night, nor has he shewn reasonable cause for absenting himself; his wife may have been unwell, but he has failed to shew that anything serious was the matter with her, and he never mentioned his wife's illness to Miss Worthington as an excuse for

his absence. I think therefore that the finding of the Police Court should be affirmed. 1862. Sept. 29.

STERLING, J.,—I concur in the judgment of my brother Temple, inasmuch as I conceive the mere practical irregularity is cured by the reasons assigned, and as, on reading the evidence, I had a strong and certain conviction that the defence was untrue.

CREASY, C. J., (*dissenting*)—I am of opinion that this conviction should be quashed. I think that there was a substantial fault in the original plaint, the root of the whole proceeding. It was a complaint "by Valoo Arumugam on behalf of Miss Worthington." Any person may be the complainant in a Police Court case (Rule 1, Shedule A, Ordinance 18 of 1861), but I know of no authority for one person to prefer a complaint which is expressed to be on behalf of another. The proceedings when so framed do not shew on the face of them (as I think they should do) who is the party that institutes the prosecution, whether it is Miss Worthington who institutes it through the agency of Arumugam, or whether it is Valoo Arumugam who institutes it out of regard for Miss Worthington's interest. I think the defendant has a right, and a substantial right, to know at once who it is that is instituting the prosecution, and who it is that is liable under the 21st clause of the Police Court Ordinance to be fined and to pay the defendant's expenses, if the prosecution is held by the Magistrate to have been instituted on false, frivolous or vexatious grounds. I am of course not to be understood as saying that this particular prosecution was instituted on false frivolous or vexatious grounds. I think quite the other way. But the necessity of substantial compliance with the requirements of the Police Court Ordinance is a matter of general principle, and decisions on it should not vary according to the supposed merits of the parties in particular cases. I think also that when on the 18th August, the day appointed for the hearing, no complainant appeared, the complaint should have been dismissed or the complainant noticed according to the 13th rule of the Rules and Orders, and I think that the Magistrate had no authority to re-open the case, as he did, on the 18th at the complainant's instance. Special powers to re-open are specially given to District Courts and Courts of Requests by Ordinance and Rules of Court confirmed by Ordinance. But no power to re-open cases is given by Ordinance or Rule of Court to Police Courts, and I consider that they do not possess any. I also greatly doubt the power of the Magistrate to amend the plaint, as was done, by strikiug out all about Valoo Arumugam, so that Miss Worthington only appeared as prosecutrix. I do not think that this is a kind of amendment, such as the 24th Rule contemplates. I have already pointed out how substantially important it is for the accused to know at once who his adversary is ; and I may observe that the rules require

1862. Sept. 29. — that the summons, which in the first instance is served upon the defendant, shall contain the name and residence of the complainant. It seems to me useless, and worse than useless, to give him this information, if when he comes before the Magistrate, another complainant is to be substituted. I do not think that these errors were cured by the defendants pleading to the amended plaint. I cannot feel that it is our duty to apply the subtle doctrine of defects cured by pleading over, to the proceedings in Police Courts. The defendants in such proceedings are generally poor and uneducated persons without the means of procuring legal advice, and themselves utterly ignorant of legal forms and processes. If the proceedings against them have been so faulty as to have deprived them of any substantial safeguard or privilege which the law meant to give them, I think that the Supreme Court should protect them by quashing convictions based on such proceedings, whatever may have been the subsequent pleadings. Indeed unless the Court does so interfere, I do not see how any adherence to the Police Court Ordinances as to process can be secured. Defendants are sure in 99 cases out of 100 to plead over: and if this is to cure all faults, a most mischievous laxity of practice is most likely to be introduced, and great practical hardship is likely to be inflicted on accused persons.

There has also in my opinion been an error, a substantial error, in applying the evidence taken in the case. I am of course not going to lose sight of the clause of the Police Court Ordinances which limits our power in appeal to questions of law. But if the convicting Magistrate had considered the evidence with reference not to the true point in the case, but to a collateral point, an error in law has been effected, just as if a judge in England were, in summing up the facts to a jury, to direct them to give their verdict according to the opinion which they might form on a particular point, such point not being the real one, on which the decision ought to turn.

The main facts of the case as proved for the prosecution may be briefly stated. On the 11 August, the proseeutrix gave orders to the defendant, who was her head-servant, that he was to sleep in the house that night. No objection was made to the order, and the prosecutrix, an English lady, in the absence of her brother, required the safeguard of her servants being in the house. The defendant was to go to his own house that evening to get his supper and was then to return to his employer's house and remain there. He knew that tea would be wanted at 5 next morning, as his mistress was going then to join a boating party of some of her friends. The defendant told another servant to prepare the morning tea and went away, but did not return to the house as ordered. His mistress did not see him there till 11. 30, the next day. According to a witness for the defence, he came to the house a little

before 6 in the morning, but certainly he was absent all night. His absence caused considerable inconvenience to his mistress: he made no excuse for it, and she did not hear anything about any illness in his family, till that defence was set up by him at the trial in the Police Court. It was proved that he had before this occasion repeatedly disobeyed orders. And I think that, though it would have been more correct if the proof had been given by mentioning specific instances of previous disobedience and not by a general statement, such statement was substantially admissible. It was material to ascertain whether the defendant's not fulfilling his mistress's order in this case was wilful and without reasonable excuse; and I think that it comes within the class of cases, such as cases of maliciously killing, of receiving property with guilty knowledge, and others, which will be found in 1 Taylor on Evidence, 34, 2 Russel on Crimes, 777, where in order to ascertain the existence of a guilty *animus*, evidence of other guilty acts of the same kind is (under certain restrictions) admitted by law. 1862. Sept. 29.

That under the circumstances above stated, Miss Worthington should write to the nearest Police Magistrate, complaining of her servant's misconduct seems to me perfectly natural and proper, nor do I see that the Police Magistrate committed any impropriety in advising her to have proceedings taken under the Ordinance applicable to such a charge. Such advice not prejudicing the merits of the case: it merely amounts to saying to the complainant "if you want this matter investigated before me, the following is the mode of doing so."

But I must turn to the defence set up by the defendant, and see whether that defence has been considered by the Magistrate as bearing on the real point in the case. The accused called four witnesses, whose evidence, as I read it, proves that about 9 p. m. of the 11th (which would be about the time when the defendant was to return from his supper at his own house to his mistress's) the defendant's wife was ill and that he fetched a doctor to attend her. She was in the family way and near the time of her confinement. She does not appear to have been very ill; and the doctor did not think it necessary to remain there more than half an hour. There is no proof that she had Cholera, as asserted by the appellant in his petition of appeal; indeed, before the Magistrate, he only said that his wife was ill. But I think that the evidence adduced by him does shew that, considering the woman's condition there was that amount of illness, which might make her husband naturally and fairly think it his duty to stay by his wife to attend to her, and to be ready to bring the doctor back, if shew grew worse. If his not returning to his mistress's house was caused by these facts and feelings, I do not think that he was punishable under this Ordinance.

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The Magistrate in his judgment says "I am perfectly satisfied "from the accused's own statement, that when he left his mistress's "house, he had no intention whatever of returning before the "morning, notwithstanding Miss Worthington's order that he "should sleep at her house as he had engaged to do; otherwise, "he would not have delivered her orders, intended for himself, to "the second servant, to have tea ready in the following morning "by 5 o'clock, to enable her to go out boating as she had engaged "to do with Mr. Folkard, and his refraining from her any explana- "tion of his conduct, in thus disobeying her orders, clearly shews "not only his want of proper respect for his mistress, but an "amount of indifference towards her closely bordering on imperti- "nence, and which it is very necessary should be put down and "punished."

Now it appears to me that the Magistrate was confining his attention to what was the defendant's intention at the time when he, the defendant, left his mistress's house to get his supper; and he adjudicates that he, the defendant, at that time intended to disobey her orders. I accept, because I am bound to accept, the express finding of the Magistrate on a matter of fact. But this does not, at least, it ought not to, determine the case. The defendant did not disobey orders by leaving the house to go home to get his supper. The disobedience in the case was the not returning. When he left the house, he committed no offence; but he is found to have intended the future commission of an offence. But no principle of criminal jurisprudence is more certain than that mere intent is not in itself an offence punishable as the commission of an offence by our tribunals. The time for the commission of the offence was when the time came for the man's return after supper to his mistress's house; and before that time had come we see (unless we reject the evidence for the defence) that a state of things had arisen which gave him a fair reason for not returning according to orders. I do not feel bound, I do not feel at liberty to reject the evidence for the defence. The Magistrate does not in his judgment, or in any of the proceedings before us which form the regular record state that he disbelieved the witnesses. I take the wife's illness, such as before described as a fact in the case; and it seems to me that there has not been an adjudication, that the man in remaining at home with his sick wife uninfluenced by the fact of his wife's illness and was acting in mere pursuance of his original intent to disobey his witness. His omission to tell his mistress the next morning of his wife's illness does not seem to be conclusive against him. His mistress did not ask him why he had been absent. His fellow-servant appears to have asked him the question, and it appears that he did tell his fellow-servant that he did not return at the appointed time, because his wife was ill.

After the appeal was lodged, two documents have been sent to us, one a petition from the brother of the prosecutrix, and the other a letter from the Magistrate, complaining of the comments of the press on the case, and justifying the conduct of the prosecutrix and of the convicting Magistrate. 1862. Novr. 7.

I do not think that either of the parties to an appeal, or the judge whose decision is appealed against, or indeed that any person whatsoever, ought to address such communications to this court, and I have paid no attention to them in considering his case. Our judgments are based solely on the records and proceedings that are brought regularly before us. We sometimes ask for further explanation from the judges whose decisions we review, and every attention is paid to information given in answer to such requests. But I do not think that comments on the case ought to be volunteered, even by the Magistrate; and from any other quarter they are wholly inadmissible.

I am expressing the opinion of my learned brothers, as well as my own, as to the impropriety of such communications being made to us. With regard to the case before us, in my judgment the conviction ought to be quashed; but as a majority of this court think differently, the judgment of the convicting magistrate will stand affirmed.

7th Novemder.

Present:—Creasy, C. J., Sterling, J., and Temple, J.

D. C. Matara. No. 19452. } *Ratnapala Terunanse* v. *Rewitte Terunanse.* et al.

Vihare property—succession—alienation.

Per Curiam:—In this case, one Sangarakkitte Terunnanse by a deed in 1812 granted certain vihare property to his three pupils, and the one-third now in question came in regular succession to one Sidharte Terunnanse as a pupil of one of the original grantees; he however died without any pupil, and before his death conveyed his interest in the vihare property, by a deed dated 24th July 1857 to the plaintiff, a stranger; and the question for decision is whether Sidharte Terunnanse could thus convey away his interest in the property to a stranger, or whether, he not having left any pupil, it should not revert to the other two original grantees and their pupils in succession. This question depends entirely upon the construction to be put upon the deed of 1812, which the Supreme Court considers expressly declares that the property thereby granted shall descend from pupil to pupil in succession.

1862. Novr. 7.

Execution—criminal process—Sentence of death—warrant for execution—escape of prisoner—re-arrest—application by Queen's Advocate for *habeas corpus*—power of Supreme Court—rule to order execution.

In re conviction of *Valaidepody* for murder.

The Queen's Advocate filed affidavit of Mr. John Morphew and Mr. Thomas Wambeck, and moved thereupon for a writ of *habeas corpus* to the deputy Fiscal of Batticaloa to bring up, or cause to be brought up, the prisoner Valaidepody, tried and convicted of murder at the last sessions held in Batticaloa, in order that execution might be awarded by the Court and a day appointed for that purpose. He further moved that the Deputy Fiscal of Batticaloa be directed to send to this Court the Calendar signed by the Judge at the last sessions held at Batticaloa, and the Governor's warrant for the execution of the prisoner.

The following order was made by the Supreme Court:—

This prisoner was on the 24th August last tried and convicted for murder at the criminal session of this Court held at Batticaloa in the course of the last Northern Circuit. Sentence of death was passed on him by the judge who tried the case in the form that has long been used in this Island, directing execution to take place at the common place of execution in the District of Batticaloa between the hours of 9 and 11 in the forenoon of the 6th October then next.

A report of the case with a copy of the evidence was duly sent immediately after trial to the Governor, who appears to have considered the case to be one in which it was fit that the law should take its course; and (in accordance with long established custom in such cases) a written warrant signed by the Governor for the execution of the sentence, at the time and place named in the judge's sentence, was sent to the Fiscal.

Preparations were made by the Fiscal for the execution of the sentence on the 6th of October, but on the morning of that day, the prisoner escaped from gaol, but was re-taken in the evening.

The execution not having been performed on the day which had been specified both in the judge's sentence and in the Governor's warrant, and the prisoner having been for a time (though only for a short time) out of the Fiscal's custody, the present motion is made to the Supreme Court; and it is made with the avowed purpose of applying to this court, when the prisoner is brought before it, for a rule to order the execution.

This is done on the analogy of several cases that have occurred in England, where difficulties have arisen as to the execution of capital sentence. In such cases, the prisoners and the records of their trials having been brought before the Court of Queen's Bench by *habeas* and *certiorari*, that court "being the Supreme Court of criminal jurisdiction" (see Chitty's Criminal Law, i. p 698) has awarded execution, and has exercised a discretionary power of directing in what county the execution should take place. The case *Rex v. Garside*, 2 Ad. and El. p 266, is the latest of these

1862. Novr. 7.

cases, and the whole subject was on that occasion very fully discussed and considered.

We have no doubt as to the Supreme Court of Ceylon possessing a power analogous to that exercised by the Queen's Bench in England. The Charter in clause 3 directs that "the entire administration of justice, civil and criminal, in the Island shall be vested exclusively in the Courts created by the Charter," with some reservations as to the Admiralty Courts which are immaterial here. The 5th clause appoints that there shall be one Supreme Court in the Island; and the 31st clause grants to the Supreme Court "power, jurisdiction and authority to hold an original jurisdiction for inquiring of all crimes and offences committed throughout the said Island, and for the hearing, trying and determining all prosecutions which shall be commenced against any person for or in respect of any such crimes or offences or alleged crimes and offences."

The power of ensuring and enforcing the execution of sentences is obviously necessary for the administration of criminal justice. Without it, all other powers would be idle; and the perversity, the caprice or the negligence of an inferior officer of the executive might baffle the arm of the law, and secure impunity for the worst of offenders. We decide unhesitatingly that this court has the power to grant the writs now asked for for the purpose mentioned; and as in the case of the *King v Garside*, the court of King's Bench held that the attorney-general, moving on behalf of the crown, was entitled to the writs as of course, we feel bound to hold that the advocate-general here, moving on behalf of the Crown, is entitled to the writs as of course, if he demands them.

We at first thought it would be necessary for us to go at once into the whole subject of the effect of the words as to the time and place in the sentence passed on this occasion, and as to the effect of the Governor's warrant. If it had been quite clear to us that the Fiscal had still authority and was still bound to execute the sentence at the first convenient opportunity, and that no legal right of the prisoner could be prejudiced by such a course, we should have suggested to the learned Queen's Advocate the expediency of first ascertaining, whether the Fiscal would not, on being informed of the judgment to this Court, proceed at once to do his duty and execute the sentence at Batticaloa, and of so avoiding, if possible, the delay and risk of escape consequent on bringing the prisoner from Batticaloa to this place. But the Queen's Advocate has very properly pointed out that the prisoner not having been continuedly in the custody of the Fiscal has a right to have an opportunity of pleading before us *non-identity:* that is, of asserting that he, the man now in custody, is not the same person as the man who was sentenced. The Queen's Advocate cited on this point *Radcliffe's*

1862. Novr. 14. — *case* reported in Foster; and the authority of Chitty's treatise on Criminal Law, i 777, may be added. As therefore the prisoner is to come before us, we think it better to defer the consideration of the form and effect of the sentence and warrant until he is present. He will have a right to be heard on these matters, and we will uot in any way prejudge him by discussing them in his absence.

Writ granted as prayed.

13th Novomber.

Present:—Creasy, C. J., Sterling, J., and Temple, J.

C. R. Pantura, No. 3602. } *Fernando* v. *Soyza*

The judgment of the court below was affirmed in these terms:—

Practice—claim in execution.

The Supreme Court has reason to believe that it has been the practice for the claimant in execution to be required to give proof of his title in all cases where he is not reported to be in possession. The Supreme Court think it best to follow the established practice in this instance.

14th November.

Present:—Creasy, C. J., Sterling J., and Temple, J.

P. C. Trincomalee, No. 1549. } *Buttery* v. *Keating*

Irregularity—summons—binding over to keep the peace—statements by J.P.

The order of the Police Magistrate was affirmed as follows:—

Had it not been for the 8th section of Ordinance 4 of 1855, the Supreme Court should have been disposed ot think that these proceedings could not be sustained. There is a serious and substantial fault in the summons. The defendant (Rev. L. M. Keating) is summoned to answer a charge of assault. On coming before the Justice, he finds that the proceeding against him is not to obtain a conviction for assault, but to cause him to be bound over to keep the peace under the special power given by the Ordinance ; and he is refused time to bring his witnesses on account of the peculiar wording of the 4th clause, which directs the Justice to hear such evidence on behalf of the party who is called on by the compainant to give surety, as the accused party may have ready.

But the 8th clause enacts, *inter alia*, that a person who in the presence of say Court or Justice of the peace "evines an intention of committing an offence against the person of another," may be ordered by such Court or justice to give security to keep the peace. And in this case the Justice has recorded (in effect) that the demeanour and manner of the defendant throughout the proceedings before the Justice have been so excited and of such a nature as to be of themselves sufficient to the Justice's mind to make him believe that the defendant would (unless restrained by law) commit a breach of the peace, and that he, the defendant, ought to be bound over to keep the peace. The Supreme Court must give full credit to the statement of the Justice as to what took place before him: and the Supreme Court thinks that it warranted him in binding the defendant over. 1862. Novr. 27.

The Supreme Court affirms the order on this ground—on the conduct of the defendant when before the Justice. The Supreme Court gives no opinion as to the merits of the parties in the transaction, which gave rise to the proceedings.

27th November.

CREASY, C. J., STERLING, J., and TEMPLE, J.

D. C. Jaffna, No. 9601. — *Canepady* v. *Vally.*

Prescription—effect of non-suit.

Per Curiam:—The Supreme Court held in a case from Kurunegala 29111, decided in Supreme Court 19th July 1854, that a former case, although nonsuit, is a bar to the Prescriptive Ordinance, and therefore considers the case No. 1699 by the plaintiff against defendant a bar to defendant's prescription.

Creasy C. J., (*dubitante*): without positively differing from the opinion expressed by the majority of the Court in this case, and from the judgment of our predecessors in the Kurunegala case, I must state the question is one in which I entertain great doubt.

D. C. Batticaloa, No. 13452. — *Nalletamby* v. *Madatte,* et al.

Prescriptive Ordinance.

The Court set aside the judgement of the Court below in these terms:—

The plaintiff produced a title deed in his favou dated in 1837. This, if there were nothing else in the case,

1862. Novr. 27.

would give him a right to recover; but the defendants meet it by proof of their possession for ten years. On the other hand, the plaintiff proves that within the 10 years (in January 1852) the defendants joined in a notarial deed, whereby they recognised the plaintiff's deed of 1839 as the still existing and valid title deed of the property. This was an " act by the possessors from which an acknowledgment of a right existing in another person must fairly and naturally be inferred." This act therefore brings the case within the proviso in the 2nd clause of Ordinance 8 of 1834, and defeats the right which ten years possession would otherwise have given the defendant.

P. C. Kandy, No. 54502 } *Carupan* et al. v. *Veeran.* et al.

The following is the judgment of the Supreme Court:—

Resisting execution of J. P. warrant.

In this case, the plaint alleged that the defendant resisted the complainants and a Fiscal's peon in the apprehension of certain coolies under a warrant from the Justice of the Peace.

This warrant was in the common form of one for apprehension, directing the Fiscal of the Province to bring the bodies of certain persons before the Justice who issued the warrant, or some other competent J. P. forthwith.

Sometime after the warrant was issued, it was returned to the Justice with " non est inventus" endorsed on it ; and after it had been so returned, the clerk, without the authority of the Justice, handed this warrant back with this further endorsement made by himself without the Justice's authority—" warrant re-issued."

The complainants in acting on the warrant so re-issued were resisted : whence came the charge contained in the plaint.

The Police Magistrate dismissed the charge on the ground that the extension or re-issuing of the warrant was made by the clerk of his own motion, and not by the J. P.

This judgment now comes before the Supreme Court in appeal. Mr. Lorensz for the appellant relies on the case of *Dickinson v. Brown*, 1 Espinasse's Reports, 218 ; but this court considers it not to apply as one decided on the doctrine of consent; and further regarding the 9th section of the 13th chap. of Hawkin's Pleas, vol ; i, it affirms the dismissal of the plaint.

D. C. Galle, No. 20467. *Ahamadoe Lebbe* v. *Muttappa Chetty.* 1862. Novr. 27.

D. C. Galle, No. 20466. *Ahamado Lebbe* v. *Alagappa Chetty.*

The following is the judgment of the Court:—

Claim for freight—claim in reconvention for damage to cargo and for short delivery—cross action—set-off—Ordinance No. 5 of 1852, clause 1.

These were cases in which the plaintiff sued for freight, and in which the defendants set up claim by way of reconvention against the plaintiff for damage to the cargo and for short delivery.

Evidence on both sides was taken. At the conclusion, the judge gave judgment for the plaintiff for the full amount of freight in both cases, stating as his reason for such judgment that defendant's claim for damages cannot be maintained as a set-off against the freight claimed by plaintiff.

The Supreme Court think that this is an erroneous view of the nature of re-convention. Reconvention is equivalent not to set-off, but to cross-action, and the English authorities that have been cited to shew that this defence could not be maintained by way of set-off are therefore inapplicable. It is clear that a cross-action could be maintained for the damage to the cargo and short delivery; and according to Roman Dutch Law, the defendant may bring this matter forward by way of reconvention, subject to the discretionary power of the judge to disallow the reconvention, and to direct the defendant's claim to be brought forward in an independent action, if he, the judge, thinks the plaintiff's claim to be dubious and dilatory.

Had the District Court Judge exercised such a discretion here, the Supreme Court should not have lightly interfered with it; but he has not done so. He has considered that the defendant's claim by way of reconvention is absolutely inadmissible, and this was in the opinion of the Court, an error of judgment.

The Supreme Court has been pressed with the Ordinance 5 of 1852, § 1, as bringing these cases under the exclusive operation of English Law, not only as to the rights which give the parties their causes of action, but also as to the conduct of the cases; and it has been argued that the Ordinance thereby shuts out the power of pleading in reconvention anything that could not have been pleaded in England by way of set-off.

The Supreme Court do not think that the Ordinance has that operation. If the defendant here were denying the plaintiff's right of action, this court should follow the Ordinance and the English Law which the Ordinance points out, and this Court should decide against the defendants. But the defendants do not deny the plaintiff's right of action: they say in effect, "it is true that you have a right of action against us for freight, but we have a right of

1862. Decr. 2.

action against you for damages, and let the two matters be considered together, and let the Court determine on which side the balance inclines and what amount."

This power is certainly not taken away by the Ordinance in express terms, and this Court does not think that it is taken away by implication. To hold the contrary would make a very serious innovation in the law of this Island, especially when we remember that the 2nd section of the Ordinance applies English Law to bills of exchange and promissory notes quite as fully as the 1st section applies it to maritime matters.

As the whole evidence is now before the District Court Judge, he had better consider it and decide the cases on their merits.

2nd December.

CREASY C. J., STERLING J., and TEMPLE J.

D. C. Kandy, No. 30033. } *Duncan* v. *Keria*,

This case was remanded for re-hearing in these terms:—

Trespass—plaintiff's right to the property injured.

Remanded. In this case, the plaintiff sued for cattle trespass to a coffee estate. In his examination he stated that he was not the proprietor, but the manager of this estate and other estates of the proprietors, Messrs Tindall. He also stated that he held no power of attorney from the proprietor.

On this he was non-suited. The nonsuit was to say the least premature; further inquiry must be made, and it must be ascertained whether the plaintiff was in actual occupation and possession of the estate at the time of the trespass. If so, he has a right to maintain this action against a mere wrong-doer.

The authorities, which shew that any possession of real property is sufficient to entitle the possessor to sue a mere wrong-doer, will be found collected at p. 580 of Roscoe's Nisi Prius, and p. 1127 of Lush's Saunders on evidence and pleading, vol 2. The Supreme Court will refer to the only case in particular, that of *Elliott* v. *Kemp*, 7 Meeson and Welsby p 312, on account of the authority of Lord Wensleydale, who there lays down the law most distinctly.

If upon inquiry, it should turn out that the plaintiff had no occupancy or actual possession, but had merely the right to go to the estate occasionally for the purpose of inspecting it, or some other temporary purpose, this court does not think that the plaintiff can maintain this action.

2nd December.

1862. Decr. 2.

Present:—CREASY C. J., STERLING, J. and TEMPLE, J.

C. R. Jaffna, No. 27355. *Cadirgamen* v. *Worthington.*

Master and servant—action for wages—plea of forfeiture by disobeidience or misconduct—Ordinance 5 of 1841 clause 7 [Ordinance 11 of 1865, clause 11]—Rights of master.

On appeal preferred by the defendant, the Supreme Court affirmed the judgment of the Court below, in these terms:—

In this case the plaintiff sued the defendant for wages due to him as gardener. The defence was that the plaintiff had forfeited his wages under the 7th clause of Ordinance 5 of 1841, by wilful disobedience.

The commissioner rightly held that there had been no disobedience of orders proved, inasmuch as the plaintiff who was hired as a gardener was not bound to do horse-keeper's work; and it appeared that his master, the defendant (G. E. Worthington), had dismissed him unpaid, for refusing to do stable duty.

The commissioner also rightly held that the master cannot decide in his own behalf, that the servant has committed a forfeiture of wages, under clause 7 of the Ordinance, so as to found a claim of set-off in his (master's) behalf. If the master wishes to enforce the 7th clause against a servant, he must institute a proper judicial proceeding, and not make himself summary judge in his own favour.

The Supreme Court wish, while upholding the commissioner's decision, to guard against any one supposing from this case, that a master, when sued for wages by a servant, who has seriously misconducted himself, cannot set up such misconduct as a defence, either complete or partial, to a claim for wages.

The law is very different. Independently of any Ordinance, the law empowers a master to discharge without notice a servant guilty of gross misconduct, and the servant so discharged is not entitled to any wages that have not previously accrued due. See notes on Smith's *Leading Cases*, vol. 2, p. 23, and Chitty on Contracts p 501, and Addison on Contracts, p 493. Mr Addison gives two very useful lists of instances of such conduct as justifies the summary dismissal of a servant; and of instances of such slight mis conduct as does not amount to sufficient grounds for dismissal without notice.

Besides this common law right, the 9th clause of Ordinance 5 of 1841 enables the Court, when a servant sues for wages, to make abatement from the wages, on account of the servant's absence from or neglect of work, and also for the value of breakages or damage done to the employer's property, through the servant's misconduct, gross negligence or carelessness. The master may, when sued for wages, avail himself either of the common law defence or of the

1862. Decr. 8. — statutory defence, which we have mentioned, if the facts warrant it, whether he has prosecuted the servant under the 7th clause of the Ordinance or not.

The Supreme Court make these observations on account of the general practical importance of the subject, and will only further remark that the present defendant has suffered no substantial damage through his mistake in law about the 7th clause of Ordinance, inasmuch as the facts of the case clearly shew that he had no defence on the merits.

8th December.

Present :—CREASY, C. J., STERLING, J., and TEMPLE, J.

P. C. Kaigalle, No. 18266. } *Perera* v. *Kandasamy*, et al.

Irregularity —Justice of peace proceedings— conversion into Police Court case— doctrine of consent.

Dias for appellant.

The following judgment of the Court sets out the facts of the case :—

In this case the defendant was taken up under a J. P. warrant on a charge of assault. He was bailed and he appeared on the day appointed before the J. P. On this so appearing, the prosecutor applied to have the case transferred to the Police Court. The defendant does not seem to have objected. The case was then treated as a Police Court case. A plaint for an assault was forthwith entered, and the same Magistrate (being a P. M. as well as a J. P.) proceeded there and then to try the case as a Police Court case. No appointment of a day for trial was made, and no sum mons under the Police Court Ordinance appears to have been served The defendant pleaded "not guilty," and he does not appear to have taken any objection to the manner of the proceedings. He called a witness in his defence but was convicted. He now appeals against that conviction.

It is quite clear that the proceedings were very irregular, and we think that the irregularity was such as to prejudice the defendant in a substantial right. This court has before now quashed a Pelice Court conviction, because the summons had been defective (see 9534 Matalle, Lorenz's Rep. p 192). In the case before us there has been no summons at all. It is true that the appellant had notice by the justice of the peace proceedings of the matter which was to be charged against him; but we think that there is a great difference between notice to undergo a preliminary examination from which the J. P. is to decide whether or not he will send the

accused to meet his trial before another tribunal, and notice to the man to prepare to stand a final trial at once before a Police Magistrate. 1862. Decr. 16.

We are further of opinion that the defects in these proceedings are not cured by the defendant's having pleaded to the Police Court plaint, even if his conduct is to be treated as an assent to what took place. There is a judgment of this court in *P. C. Pantura 1333*, delivered on 5th November 1860, in which we decided after much consideration, that even an express consent on the part of an accused person in a criminal case cannot legalize a substantial violation of law.

16th December.

Present:—CREASY, C. J., STERLING, J., and TEMPLE, J.

D. C. Manaar, No. 5632. } *Mascoreen* v. *Genys.*

Proprietary rights—Christian Church—evidence—R. and O, 2nd July 1842, rule 8—new trial—precarious possession.

The plaintiff (the Rev. Mascoreen) brought this action, founded on his possessory right by reason of a year and a day's possession, against the defendant (the Rev. Genys), who had turned him, the plaintiff, out of possession of a Church, and had possessed himself thereof.

The defendant's justification in substance was that the Church belonged to the Roman Catholic Bishop of Jaffna, that the plaintiff had been placed in the Church by that Bishop, but had since been contumaceous to his Bishop and had thereby become liable to be turned out by him, and that the defendant by the Bishop's orders turned him out accordingly.

As to one point in dispute between the parties, namely whether the plaintiff held under the Roman Catholic Bishop of Jaffna or not, certain evidence was, we think, erroneously held inadmissible by the District Court Judge. Letters on the subject, purporting to be written by the plaintiff, were produced by the defendant at the trial; but the Judge held that as they had not been filed, he was bound to reject them under the 8th Rule of 2nd July 1842. He does not seem to have exercised any discretionary power as to admitting or rejecting them, but to have considered them absolutely inadmissible. This is not a right construction of the Rule. The last part of the rule gives the judge a discretionary power to admit the evidence if it seems to him just and expedient. This power has generally been and ought to be very liberally exercised. It is almost always best to let the objection of late production tell against the value, and not against the admissibility, of testimony.

1862. Decr. 18.

If the District Court Judge thinks that the evidence has been unfairly and trickily kept back, he will be quite right in viewing it with suspicion, which indeed in such a case will naturally be extended to the whole conduct in the cause of the party who deals with his evidence in this manner.

As the letters in question would not be unimportant as to the dispute about the plaintiff being or not being subject to the Roman Catholic Bishop of Jaffna, the Supreme Court would have sent the case back for a new trial, if there had been no other point in the case on which the defendant was bound to satisfy the court in his favour, in order to obtain a verdict. But there is. The defendant asserted and ought to have proved that he turned the plaintiff out, by the Roman Catholic Bishop of Jaffna's orders. He not only failed to prove this, but he himself disproved it in the most positive manner, when examined by the court, when he stated that he acted by nobody's orders. The Supreme Court do not grant new trials for erroneous rejection of evidence, where it is clear to us that the evidence, if received, would not enable the party who tended it to a verdict.

The Supreme Court decides nothing in this case as to any proprietary rights ; it only determines that the plaintiff, who has proved his possession of the church for many years before the defendant turned him out, can maintain this possessory action against a mere wrong-doer. The Supreme Court investigated a few days ago, in a case *(C. R. Kandy, 30033)* the English authorities as to the right of action which possession gives as against trespassers. Two Roman-Dutch authorities have been cited in the present case, which strongly confirm the opinion to which the Supreme Court then arrived: a passage in Grotius, p 109 shewed that precarious possession is not enough as against strangers ; another passage, cited from Bort's *Tracts*, establishes that possession *virtute officii* is precarious possession.

18th December.

Present :—CREASY, C. J., STERLING J., and TEMPLE, J.

D. C. Galle, No. 9516. } *Lebbe Saibo* v. *Marikar* et al.

Contempt of Court—resistance to process.

In this case the 1st appellant was defendant in a suit brought against him by one Saibo (who is complainant in the present case) to recover possession of a certain house.

The plaintiff obtained judgment and a writ issued directing the Fiscal to place the plaintiff in possession of the house, describ-

ing it specifically. On going thither for that purpose, the Fiscal's officer was resisted by the defendant (1st appellant) and by the defendant's son (the 2nd appellant) who lived in that house with his father. 1862. Decr. 18.

After a due investigation of the subject, they were both very deservedly fined by the District Court Judge for contempt of court.

As regards the 1st appellant, the case was too clear to admit of the slightest doubt. With regard to the 2nd appellant, we wished before giving judgment, to look to some decisions which were said to have been pronounced formerly by this court, as the power of District Courts to punish for contempt persons who resisted their process, not being parties to the suit in which the process issued.

By the kindness of Mr. Lorenz, we have been furnished with reports of these cases. The first is *D. C. Matara, No. 303* (decided 20th January 1857): there commissioners had been authorized by process of the Court to take, not any specific article of property, but such property as wholly belonged to the deceased. They tried to seize some articles in the possession of a man who was not a party to the suit, and it was held that the man was not punishable for contempt in refusing to give up the things to them, inasmuch as there had been no legal adjudication that the goods, which the man claimed, was the deceased's property. So in the other case, *D. C. Matara 19011* (decided 20th May 1857), the writ of sequestration ordered the Fiscal generally to seize the defendant's goods. The Fiscal's officer endeavoured to seize some plumbago which third parties claimed ; and there again this court held that it would be premature to commit such claimants for contempt, before it had been judicially ascertained that the plumbago was the defendant's property, and as such within the scope of the writ.

Both these cases differ widely from the present one. The evidence in the present case clearly proves a wilful contempt by both appellants. And the judgment as against both is affirmed.

D. C. Colombo, No. 28,555. } *Nannytamby* v, *Saravanamuttu.*

Deed of arrangement—preference to one creditor—concealment by debtor.

The plaintiff in this case sued the defendant on a bond bearing date 19th April 1860 for a sum of £300. The defendant pleaded that, by a certain deed dated the 10th of August 1861, an agreement was entered into between himself and certain of his creditors, of whom plaintiff was one, whereby the defendant was to have time to pay the several sums of money which he then owed to them (including plaintiff), by two equal instalments, one half whereof was payable within two years from the date of the agreement and the other half within three years of that date.

1862. Decr. 18.

The plaintiff admitted the execution of the deed, but pleaded that his signature was obtained thereto by fraud and misrepresentation on the part of the defendant, in that he, the defendant, at the time of obtaining the plaintiff's signature, undertook to secure the signatures of all his other creditors, whereas two of those whose names were mentioned in the deed did not sign it, and there were other creditors who were not made parties at all to the deed in question; and further that the defendant had paid off certain claims in full before the expiration of the period contemplated by the agreement referred to in the answer.

The learned District Judge set aside the "composition deed" and entered up judgment for plaintiff.

On appeal, the Supreme Court affirmed the judgment in these terms:—

The defendant in this case had on the 10th April 1861 made an arrangement with his creditors, by which they agreed to give him time to pay his debts. He was to pay half within two years, and the other half within three years from the date of the agreement. At the time when this agreement was made, there was a private understanding and agreement between the defendants and one of the creditors, named Sinnetamby, that Sinnetamby should have the defendants promissory note at four months for £180, being about half the amount of Sinnetamby's claim.

When the plaintiff discovered that this preference had been given to Sinnetamby, he (plaintiff) brought his action to recover the debt due to him (plaintiff) at once; and he contends that he is not bound by the agreement or "composition deed" of April 1861. The plaintiff says that the composition deed is vitiated by the private arrangement between the defendant and Sinnetamby, which was a fraud upon him, the plaintiff, and the other creditors, who signed on the faith that all were to be treated alike.

The Supreme Court thinks that this contention is well founded, and that the plaintiff is entitled to recover. To adopt the language of Chitty on Contracts, p. 591: "Where a debtor in embarassed circumstances enters into an arrangement either by deed or other wise with his creditors to pay them a composition upon their claims, or to discharge the demands in full or by instalments at stated intervals, any private agreement between the debtor and one of the creditors, who professes to join in the general arrangement, that the debtor, or a third party for him, shall pay a further sum of money or give better or further security than such as is provided for other creditors, is void as a fraud on them. The creditors bargain for an equality of benefit as to payment and security; there is a tacit understanding that all shall share alike *pari passu* and that it shall not be competent to any one of them, without their knowledge, to stipulate for any *additional* benefit or security

to himself." And a little further ou, he rightly says "It makes no difference that the favored creditor has realized nothing under such agreement, for it is the mere fact of such an agreement being made which constitutes the fraud on the other creditors." 1862. Decr. 18.

The general principle laid down in this passage (and many similar passages in other text-books might easily be added) has not been denied in the argument for the defendant in the present case. It was suggested that no real preference was given to Sinnetamby, in as much as the debtor was by the terms of the composition deed at liberty to pay the first moiety to his creditor at any time within two years, and the promissory note given to Sinnetamby was for the payment of a moiety of the debt due to him at a period within the two years. But it is obvious that a creditor, who was to be necessarily and definitely paid at the end of four months, would be in a better position than creditors who might be kept waiting at the debtor's option for the full term of two years. And the mere fact that the promissory note was to be a further security for Sinnetamby than was given by the deed which was common to all, would of itself stamp this private agreement with Sinnetamby as an illegal one. See *Leicester v. Rose*, 4 East 371.

But it was further maintained on behalf of the defendant, that although the private arrangement with Sinnetamby was illegal and void, so that Sinnetamby could not enforce it, yet that it did not operate so as to vitiate the composition deed as between the debtor and the other creditors, and so as to remit them to their original rights. No case was cited to support this proposition, but we were told that no case could be found in which th contrary had been held. A remark like this was made during the argument in *Mallalieu v Hodgson*, 20 L. J. Q. B. 343. The observation there was as follows: "there is no direct decision that a creditor cau recover his original debt, the composition deed being tainted by fraud." This observation is not strictly correct; for there is the case of *Wenham v Fowle*, Dowling's Practice Cases, vol 3. p 43, in which a debtor had fraudulently misled his creditors as to the amount of his assets. A composition deed, which they had signed under the influence of such misrepresentation, was held void, and his creditors were decided to be at liberty to sue him for their original debts. The same point was similarly determined in the case of *Vinci v Mitchell*, reported in Moody and Robertson 337. These are authorities on the principle of the present case; for it is just as much a fraud on a debtor to conceal a private agreement of preference from the bulk of his creditors, and to keep them under a delusion as to their being fair play and equality in the transaction, as it is in him to conceal part of his property, and so keep them under a delusion that he is a poorer man than really is the case, nor does it make any difference whether there is any express

1862. Decr. 18. covenant in the deed for fair disclosure, and equal treatment, or whether these things are left to the implied covenant which always exists in such matters.

The paucity of express authorities on the subject is not to be wondered at, if we consider the circumstances under which composition with creditors generally takes place. The debtor is generally not merely insolvent, but almost penniless; and it is generally his friends that provide the means of making same payment to the creditors, for the sake of which they forego their balances or give a long letter of licence. If it turns out that there has been a fraudulent preference of one or more creditors over the rest, it is seldom that the debtor is worth the trouble and expense of sueing.

On principle, the case is quite clear. The plaintiff had a just claim against the defendant payable immediately. The plaintiff gave a promise not to enforce that claim for two years. Why did he give that promise? On the faith, among other reasons, that he and all the other creditors were being fairly aud honestly dealt with and that noue was in any way preferred to the rest. The defendant was deceiving the plaintiff all the time. The defendant, in obtaining the plaintiff's signature to the deed, committed an act of dishonesty, of which the law will not permit him to avail himself. The plaintiff's promise to forbear suit, having been made without adequate consideration and in consequence of fraud practised on him, is not binding on him either morally or legally. He had a perfect right to bring this action. Affirmed.

APPENDIX.

I

[See *ante pp.* 54—68.]

The following is the judgment of the Judicial Committee of the Privy Council, (delivered on the 19th July, 1862,) on appeal from the orders of the Supreme Court of Ceylon, dated respectively the 16th of October and 3rd of November, 1870.

PRESENT :

Lord Justice KNIGHT BRUCE.
Lord Justice TURNER.
Sir EDWARD RYAN.

D. C., Kandy, No. 26,656. } *Lindsay* v. *Duff.*

Proceedings under English law—Liability of parties under a judgment depending on that law—Kandyan District—Maritime Provinces—Ordinance No. 5 of 1852—law of the forum—rights of wrong-doers—account of profits.

In carrying out the judgment of the Judicial Committee, on an appeal from the Supreme Court of Ceylon, which reversed a previous decision of the District Court of Kandy, where the proceedings had been conducted and carried on according to the English law and course of procedure, and treated as depending on that law,—

Held, that the Supreme Court was wrong iu applying the principles of the Roman-Dutch law, so as to render parties subject to a joint account liable only for a share or proportion: the decision of the Judicial Committee intending, and the English law rendering, them equally liable *in solido.*

The Roman-Dutch law is the prevailing law in force in the Maritime Provinces of Ceylon, but as the procedure of a court is the law of the forum, the *Ordinance No.* 5 *of* 1852, *cl.* 5 is not applicable to a case where the whole procedure has been carried on according to the English law, and not the Roman-Dutch law.

A wrong-doer, one who is in wrongful possession of another's lands, is not entitled to any commission for the sales he may have effected of the produce of those lands.

An account of profits is an account of receipts, after making all just allowances. In the case of a wrong-doer, commission on sales made by him, does not constitute a just allowance.

This is an appeal from two Orders of the Supreme Court of the Island of Ceylon, made in the cause of *Lindsay* v. *Duff*, and bearing date respectively the 6th of October and the 3rd of November, 1860. The grounds of the appeal are, as to the Order of the 6th October, 1860, that by that Order, the defendant, *George Smyttan Duff*, who is the respondent to this appeal, was ordered to pay into the Registry of the Court only the sums of £1,875

and £2,291. 1*s.* 6½*d.*, amounting to the sum of £4,166. 1*s.* 6½*d.*, in the whole, when, as the appellants contend, he ought to have been ordered to pay into Court the sum of £6,457. 3*s.* 1*d.*; and as to the Order of the 3rd of November, 1860, that by that order the court, over-ruling an objection taken by the appellants to a report in the cause, allowed the defendant, *Duff*, commission on his sales and purchases on account of the estate in question, and ordered him to pay into Court only the sum of £10,344 0*s.* 11½*d.*, when, as the appellants contend, he ought to have been ordered to pay into Court a much larger sum.

The cause of *Lindsay* v. *Duff*, out of which this appeal arises, was instituted by the appellants as plaintiffs against the respondent, *Duff*, and against *James Ingleton*, *Alexander Brown*, *David Baird Lindsay*, and afterwards continued against the respondent, *Duff*, as the executor of *Alexander Brown*, in the District Court of Kandy, for the purpose of recovering the possession of a coffee plantation or estate in the above-mentioned district, called the *Rajawella* plantation or estate, with mesne profits; and by the decree of the District Court, bearing date the 16th of April, 1855, it was decreed that the defendants be ejected from the premises in dispute, and that the plaintiffs, the now appellants, be restored to and quieted in the possession thereof, and that they do recover from the defendants mesne profits to the amount of £6,457. 3*s.* 1*d.* sterling, in the following proportions from the defendant, *Duff*, the now respondent, from 1st of February, 1849, to the 30th of April, 1850, and from the defendant, *Duff*, the now respondent, as executor of the estate of Colonel *Brown*, and from *James Ingleton*, from 1st of May, 1850, to 21st of May, 1853, at the rate of £1,500 a year.

From this decree of the District Court, the defendants appealed to the Supreme Court, and by a decree of that Court, bearing date the 8th of March, 1856, the decree of the Kandy Court was reversed, and the suit instituted by the now appellants was dismissed.

The appellants then appealed from the decree of the Supreme Court to Her Majesty in Council. That appeal was heard before their lordships who reported to Her Majesty their opinion; and thereupon Her Majesty, by an order in Council bearing date the 30th of June, 1860, was pleased to approve the Report and Order, and it was thereby ordered that the decree of the Supreme Court of the 8th of March, 1856, should be, and the same was thereby, reversed, and that so much of the judgment of the District Court of Kandy of the 16th of April, 1855, as directed that the defendants, the respondents to that appeal, should be ejected from the remises, and that the plaintiffs, the appellants, be restored to and

quieted in the possession thereof, and the same was thereby restored, but that so much of the said judgment of the District Court as ordered mesne profits to the amount of £6,457 3*s.* 1*d.* sterling, to be paid in certain proportions by the respondents, *Duff* and *Ingleton*, to the appellants, be, and the same was thereby varied, by ordering, and it was thereby ordered, that the mesne profits of the estate be paid by the last-named respondents, in the like proportions, into the registry of the Supreme Court of Ceylon, and that an account of subsequent rents and profits of the estate in question, received by the respondents, *Duff and Ingleton*, or either of them, or by their or either of their order, or for their or either of their use, since the 21st of May, 1853, be taken ; and that the amount which might be found due upon such account be also paid by the respondents into the registry of the Supreme Court. And after directions as to the moneys so to be paid into Court not being paid out without notice, and as to the order being without prejudice, and as to the parties being at liberty to apply to the Supreme Court, it was ordered that said cause be, and the same was thereby, remitted back to the Supreme Court of Ceylon, with directions to give effect to the said report, and that the same be punctually observed, obeyed, and carried into execution.

Upon this order of Her Majesty in Council reaching Ceylon, the appellants moved before the Supreme Court for the payment into the registry by the respondent, *Duff*, of the sum of £6,457 3s. 1d., being the amount of the mesne profits from the 1st of February, 1849, to the 21st of May, 1853, as fixed by the decree of the District Court of Kandy, and for a reference to the District Court to take the account of the mesne profits from the 22nd of May, 1853, to the 25th of August, 1860, when possession of the estate had been given to the appellants.

It was upon this motion the first of the orders now under appeal, the order of the 6th of October, 1860, was made, directing the respondent, *Duff*, to pay into the registry the sum of £4,166 1*s.* 6½*d.*, that sum being the aggregate amount of the sum of £1,875, the amount of the mesne profits at the rate of £1,500 a year, from the 1st of February, 1849, to the 30th of April, 1850, which by the decree of the District Court of Kandy was ordered to be paid by the respondent, *Duff*, and of one-half of the sum of £4,582 3*s.* 1*d.*, the amount of the mesne profits from the 1st of May, 1850, to the 21st of May, 1853, at the same rate, which by the same decree was ordered to be paid by the respondent, *Duff*, and by *James Ingleton*. By this order of the 6th of October, 1860, it was also, in conformity with Her Majesty's order in Council, ordered that an account should be taken by the registrar of the subsequent profits of the estate received by the respondent, *Duff*,

and by *James Ingleton*, or by their or either of their order, or for their or either of their use.

In pursuance of this order the registrar made his report, by which he found £16,726 0*s.* 4*d.* to be the amount of the subsequent mesne profits; but he certified that in arriving at that amount questions of interest and commission had been settled, and that interest amounting to £3,962. 1*s.* 7*d.* had been charged by the respondent, *George S. Duff*, in the accounts on the capital embarked, and commission amounting to £4,143. 9*s.* 6*d.* on the sales and purchases on account of the estate; and he certified that he had allowed both these charges in the respondent's accounts. He further certified that the shares in which the proprietors held the estates and divided the profits were as follows: estate of *Brown*, one-half; estate of *Ingleton*. one-quarter; estate of Dr. *Smyttan*, one-quarter; and that the profits divided in these proportions would stand thus: estate of *Brown*, £8,363. 0*s.* 2*d.*; estate of *Ingleton*, £4,181 10*s.* 1*d.*; estate of Dr. *Smyttan*, £4,181. 10*s.* 1*d.*

The appellants objected to this report, in respect of the allowance to the respondent, *George Smyttan Duff*, of the interest on capital, and of the commission; and upon the case coming on before the Supreme Court upon the report, the Court disallowed the interest on capital, but allowed the commission, and made the seocnd of the orders complained of in this appeal, the order of the 3rd of November, 1860. The sum of £10,344 0*s.* 11½*d.* by this order directed to be paid into the registry by the respondent, *Duff*, is the aggregate of the sums of £8,363 0*s.* 2½*d.*, by the report certified to be the proportion of the subsequent profits belonging to *Brown's* estate, and of the sum of £1,981 0*s.* 9½*d.*, being one-half of the sum of £3,962 1*s.* 7*d.*, the interest on capital disallowed by the Supreme Court. By this order the Supreme Court so ordered that the question of costs should stand over until it should be seen what, if any, further proceedings were taken in the matter under the leave given to the defendants by the Order in Council, and what might be the result of such proceedings. It is under these circumstances the appellants have again brought this case before us.

Three questions arise upon the appeal, and were argued at the bar: first, whether the respondent, *Duff*, ought not to have been ordered to pay into Court the whole, and not one-half only, of the sum of £4,582. 3*s.* 1*d.*, which, according to the decree of the Kandy Court, was payable by him and by *James Ingleton*; secondly, whether he ought not to have been ordered to pay into Court the full amount of the subsequent profits found by the report of the Registrar, and not one-half of those profits only; and thirdly, whether he ought to have been allowed the commission which has been allowed to him by the Supreme Court.

As to the first of these questions, their Lordships find themselves unable to agree in the conclusion at which the Supreme Court has arrived. That conclusion rests upon these grounds: that, by virtue of the Ordinance, No. 5, of 1852, the effect of the judgment of the District Court of Kandy, if it had remained undisturbed, would have been to be determined by the Roman-Dutch law, and that Her Majesty's order in Council has revived and reordained that judgment, not merely as to the proportions in which the mesne profits were to be answered by the respondent, and by him and *James Ingleton*, but also as to the liability of those parties under the judgment, and that, according to the Roman-Dutch law, that judgment did not give the plaintiffs (the now appellants) the right to recover against both or either of those parties the full sum payable by both of them, but gave the plaintiffs the right to recover a moiety, and a moiety only, of that full sum against each of those parties.

Upon this question, as to the effect of the Roman-Dutch law if applied to the judgment of the District Court of Kandy, their Lordships do not think it necessary to give any opinion, for they are of opinion that it ought not to be so applied. They are satisfied (as they observed in their judgment upon the former appeal in this cause) that all the proceedings in this cause have been conducted and carried on according to the English law and course of procedure, and treated as depending on that law. They are not even satisfied that the proceedings of the respondent himself, which necessitated the institution of the suit on which this appeal is brought, were not so conducted, carried on, and treated; and they are not disposed to think that upon the sound construction of the Ceylon Ordinance, No. 5 of 1852, it was meant to provide by it that the Roman-Dutch law should be applied to determine the operation and effect of a judgment or decree pronounced under a different law. They are, on the contrary, much disposed to think that this Ordinance was intended, and ought to be held to apply only to cases in which there may be a Kandyan law or Kandyan custom having the force of law, applicable to the rights of the parties in issue in the suit, and to be determined by the Court; but even if the Ordinance ought to be held to go further, and to apply not merely to the substantive rights in issue in the suit, but to questions arising on the law of procedure, their Lordships are led, from the proceedings in this suit, to believe that the procedure in the District Court of Kandy is according to the English law; and the procedure of a Court being the law of the Court, this alone would, as they conceive, prevent the Roman-Dutch law being applicable under the Ordinance.

Their Lordships have less difficulty in concluding that the

Roman-Dutch law ought not to have been applied to this case in the mode in which the Supreme Court has applied it, from the fact that it appears by the judgment that it has never before been so applied, and from the conclusion and inconvenience which would result from attempting to apply the doctrine of one law to the proceedings under another.

It is not, however, necessary, in their Lordships' judgment, for them to give, and they do not therefore give, any final opinion upon the construction of this Ordinance; for assuming it to bear the extended construction contended for by the respondeut, they do not think that it was competent to him to insist npon the Roman-Dutch law when he had throughout, both in the proceedings in the District Court of Kandy and in the Supreme Court, and ultimately upon the former appeal to Her Majesty in Council, concurred in treating the questions in the cause as depending upon the English law. Moreover, the duty of the Supreme Court was to carry into effect the order of Her Majesty in Council, and there can be no doubt that that order proceeded upon the footing of the English law being applicable to the case. Their Lordships, therefore, think that the order of the 6th of October, 1860, cannot be maintained upon the grounds on which it has been rested in the judgment of the Supreme Court; and they have no doubt that, according to the English law, the respondent was liable to pay into Court the full sum which, under the decree of the District Court, was to be paid by him and by *James Ingleton*.

They are of opinion, therefore, that this order ought to have been for payment into the registry of the Court, by the respondent, of the full sum of £6,457. 3*s*. 1*d*. What has been already said applies even more forcibly to the subsequent profits; for the payment of them rests wholly upon Her Majesty's order in Council, to which it was not pretended that the Roman-Dutch law could be applied.

Their Lordships are of opinion, therefore, that the order of the 3rd of November, 1860, ought to have directed the whole of these profits to be paid by the respondent into the registry of the Court. It was attempted to distinguish the case, as to some part of the rents received by the received by the respondent, upon the ground that he received and paid them over as agent. But their Lordships are of opinion that the respondent cannot protect himself from his liability to the appellants upon this ground; for as to the rents up to the 21st of May, 1853, the title of the appellants was established by the order of Her Majesty in Council, and as to the subsequent rents they were received and paid over *pendente lite*, when the defendant was in possession as part owner, and was wrongfully insisting on retaining that possession against the appellants.

Then as to the commission allowed to the respondent in his accounts, their Lordships are of opinion that this allowance ought not to have been made to the respondent. According to their Lordships' judgment on the former appeal, which was approved by Her Majesty in Council, the respondent's possession of the plantation or estate was a wrongful possession, and he cannot be permitted to make a profit to himself out of his own wrongful act. The Supreme Court in making this allowance seems to have proceeded on two grounds; first, that if the allowance was not made, the appellants would recover more than they could otherwise have realized; and secondly, that the account directed was an account of profits merely;—but as to the first ground, if it was maintained, every wrong-doer would equally be entitled to make and maintain such a claim, a proposition which is quite untenable; and as to the second ground, it is sufficient to say that an account of profits is an account of receipts, after making all just allowances, and that under the circumstances of this case the commission claimed by the respondent could not properly be held to be a just allowance.

The appeal also complains of the reservation of the costs contained in the order of the 3rd of November, 1860, but their Lordships see no reason to alter the order in this respect.

Their Lordships, therefore, will humbly recommend Her Majesty to reverse the order of the 3rd of November, 1860, so far as it overrules the objection taken by the appellants to the report, and to declare that by the order of the 6th October, 1860, the sum of £6,457 3*s.* 1*d.* ought to have been ordered to be paid by the respondent into the registry of the Court; and that by the order of the 3rd of November, 1860, the sum of £24,831 11*s.* 5*d.*, being the aggregate amount of the sum of £16,726 0*s.* 4*d.*, the subsequent profits, of the sum of £3,962 1*s.* 7*d.*, the interest on capital disallowed by the Supreme Court, and of the sum of £4,143 9*s.* 6*d.*, the commission allowed to the respondent, ought also to have been ordered to be paid by him into the registry, and again to remit the cause to the Supreme Court with directions to carry into effect this order; and further to order that the costs of this appeal be paid by the respondent. The order of course to be without prejudice, as provided by Her Majesty's former order in Council.

II

[See *ante pp.* 141—143.]

PRESENT :

Lord KINGSDOWN.

Sir JOHN ROMILLY.

Sir JOHN T. COLERIDGE.

D. C., Galle, No. 20,283 & 20,286. — *Rose* v. *Black* and *Black* v. *Rose*

Their Lordships do not think it requisite to call on the respondent's Counsel. The case has been extremely well argued on behalf of the appellant, and everything that could be urged been brought before us ; but their Lordships think, after giving every consideration to the arguments addressed to them, that the whole question resolves itself into one of construction of the charter-party, and is not affected by the custom of the port of delivery, even supposing that custom to be satisfactorily proved. They agree entirely with the learned Judge of the Supreme Court, and adopt his construction of the instrument in question, considering that the terms of the charter-party, " the cargo to be taken alongside, and to be taken from the ship's tackle at the port of discharge, free of expense and risk to the ship," entitled the master to demand freight upon such delivery, irrespective of the custom, if any, of the port of delivery, to take from him his lien. For these reasons their Lordships affirm the judgment of the Court below, and will recommend to Her Majesty to dismiss this appeal, with costs.